

J. rel. 200
(2)

<36605882110018

<36605882110018

Bayer. Staatsbibliothek

S

HALE'S
HISTORY
OF THE
PLEAS OF THE CROWN.

VOL. II.

79

I. rel. 200/2

PLEAS OF THE CROWN.

HISTORY

HALF 2

VOL. 8

Historia Placitorum Coronæ.

THE
HISTORY
OF THE
Pleas of the Crown.

By SIR MATTHEW HALE,
LORD CHIEF JUSTICE OF THE COURT OF KING'S BENCH.

PUBLISHED FROM THE ORIGINAL MANUSCRIPTS

By *SOLLOM EMLYN*, of *Lincoln's-Inn*, *Esq.*

WITH

ADDITIONAL NOTES AND REFERENCES TO MODERN CASES CONCERNING THE PLEAS OF THE CROWN.

By *GEORGE WILSON*, SERJEANT AT LAW.

A NEW EDITION.

AND

AN ABRIDGMENT OF THE STATUTES RELATING TO FELONIES
CONTINUED TO THE PRESENT TIME, WITH NOTES
AND REFERENCES,

By *THOMAS DOGHERTY*, *Esq.*
OF *CLIFFORD'S-INN*.

In Two Volumes.

VOL. II.

London

Printed by E. Rider, Little-Britain,

FOR T. PAYNE, H. L. GARDNER, W. OTRIDGE, E. AND R. BROOKE AND
J. RIDER, J. BUTTERWORTH, W. CLARKE AND SON, R. PHENEY,
J. CUTHELL, J. WALKER, J. BAGSTER, AND R. BICKERSTAFF.

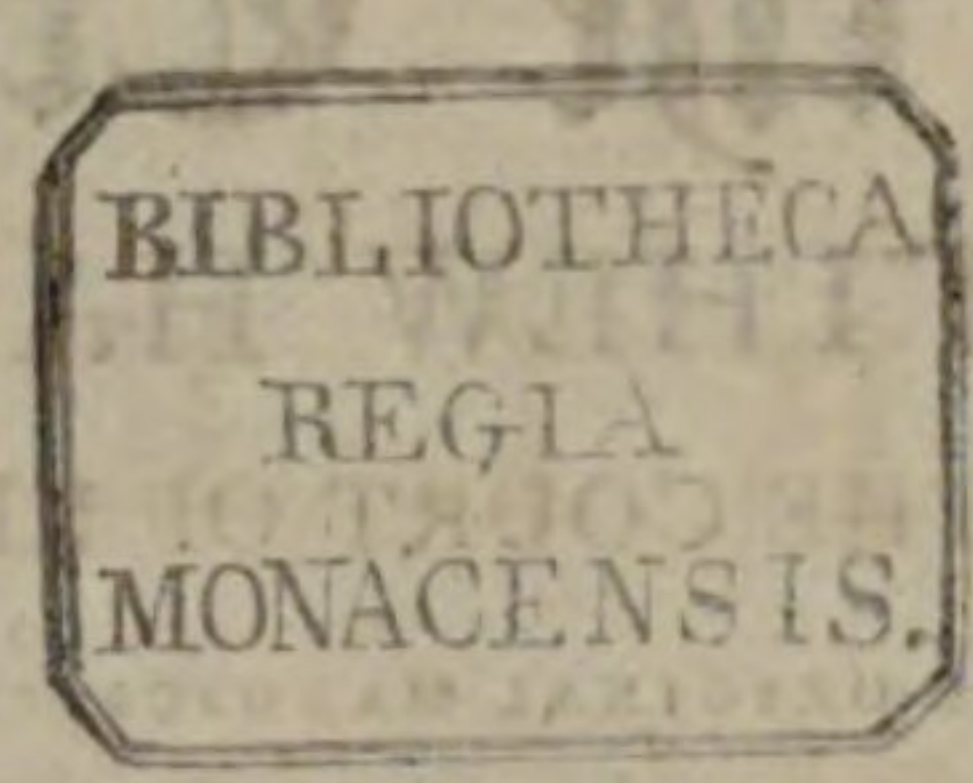
1800.

Historia Placitorum Curie

HISTORY

OF THE

Office of the Clerk



BY SIR MATTHEW HALL, LORD CHIEF JUSTICE OF THE COURT OF KING'S BENCH

BY SOLLOM BARNES, of Lincoln's Inn, Esq.

WITH ADDITIONAL NOTES AND REFERENCES TO MODERN CASES CONCERNING THE OFFICE OF THE CLERK

BY GEORGE WILSON, SERJEANT AT LAW

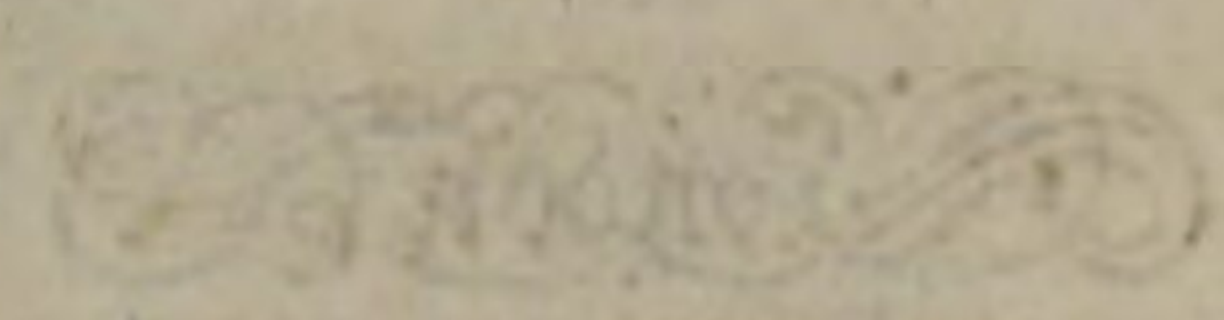
A NEW EDITION

AN APPENDIX OF THE STATUTES RELATING TO THE OFFICE OF THE CLERK OF THE COURT OF KING'S BENCH, WITH NOTES AND REFERENCES

BY THOMAS DOUGHERTY, Esq. OF CLAREBOROUGH

In 2 vols. 8vo.

VOL. II.



LONDON: Printed by J. JOHNSON, in Pall-mall, 1825.

A

T A B L E

O F

THE SEVERAL CHAPTERS

CONTAINED IN THE

SECOND PART.

Chap. I.	T OUCHING the King's bench.	Page 1
Chap. II.	Concerning the courts before the lord High-steward, and the Steward of his majesty's household.	7
Chap. III.	Touching special commissions of oyer and terminer, and their kinds and power.	10
Chap. IV.	Concerning general commissions of oyer and terminer.	22
Chap. V.	Touching Justices of gaol-delivery.	32
Chap. VI.	Touching the power of Justices of assise and nisi prius with relation to felony.	39
Chap. VII.	Concerning the commission of peace, and the power thereof in relation to felonies.	42
Chap. VIII.	Concerning the Coroner and his court, and his authority in pleas of the crown.	53
Chap. IX.	Concerning the Sheriff, his power in pleas of the crown, as well by commission as in his Turns.	69
Chap. X.	Concerning the apprehending and arresting of felons and traitors by private persons, and escapes.	72
		Chap. XI

A TABLE OF THE SEVERAL CHAPTERS

Chap. XI. <i>Concerning arrests or apprehension of felons or persons suspected of felony by an officer.</i>	Page 85
Chap. XII. <i>Of arrests of felons upon hue and cry raised.</i>	98
Chap. XIII. <i>Arrests of felons virtute præcepti, or of warrants.</i>	105
Chap. XIV. <i>Concerning the office of a justice, when a person charged or suspected of felony is brought before him.</i>	120
Chap. XV. <i>Concerning bail and mainprise.</i>	124
Chap. XVI. <i>Concerning the statutes of 34 E. 3. 1 R. 3. 3 H. 7. 1 & 2 P. & M. 2 & 3 P. & M. in relation to bailment of prisoners.</i>	136
Chap. XVII. <i>Concerning the fourth general, namely, the various manner of bailing of prisoners.</i>	140
Chap. XVIII. <i>Concerning warrants to search for stolen goods, and seizing of them.</i>	149
Chap. XIX. <i>Concerning presentments, inquisitions, and indictments, and their kinds.</i>	152
Chap. XX. <i>Where a man shall be put to answer in criminal and capital offenses without indictment at the king's suit.</i>	156
Chap. XXI. <i>Who may be indictors, and where and how returned.</i>	* 152
Chap. XXII. <i>Concerning the demeanor of the grand inquest in relation to their presentments.</i>	157
Chap. XXIII. <i>Concerning the forms of indictments in cases capital, and first touching the form of the caption returned upon a certiorari.</i>	165
Chap. XXIV. <i>Concerning the body of the indictment in cases capital, and the several parts thereof, and the forms requisite therein.</i>	168
Chap. XXV. <i>Concerning the forms of indictments in particular, and the several parts thereof.</i>	174
Chap. XXVI. <i>Concerning process upon indictments.</i>	194
Chap. XXVII. <i>Touching certiorari out of the King's bench.</i>	210
Chap. XXVIII. <i>Touching the arraignment of offenders in capital offenses.</i>	216
Chap. XXIX. <i>Concerning the plea of the prisoner upon his arraignment, and first of his confession of the fact charged, and approving others.</i>	225
Chap. XXX. <i>Concerning the pleas of the prisoner upon his arraignment, and first, concerning pleas in abatement of the indictment.</i>	236
Chap. XXXI.	

CONTAINED IN THE SECOND PART.

Chap. XXXI. <i>Concerning pleas in bar of an indictment of felony or treason, and first of auterfoits acquit.</i>	Page 240
Chap. XXXII. <i>Concerning the plea of auterfoits attainr or convict of the same felony, or any other offense.</i>	251
Chap. XXXIII. <i>Concerning pleas to the felony, viz. Not guilty.</i>	255
Chap. XXXIV. <i>Touching the trial of offenders by jury, and first the process.</i>	259
Chap. XXXV. <i>Concerning challenges, and first of peremptory challenges.</i>	267
Chap. XXXVI. <i>Concerning challenges for cause in case of indictments for treason or felony.</i>	271
Chap. XXXVII. <i>Concerning evidence and witnesses.</i>	276
Chap. XXXVIII. <i>Concerning evidence in writing.</i>	284
Chap. XXXIX. <i>Concerning evidences requisite or allowed by acts of parliament, and presumptive evidence.</i>	286
Chap. XL. <i>Concerning variance between the indictment and evidence, and where the evidence proves the indictment, and where not.</i>	291
Chap. XLI. <i>Concerning the demeanor of the jury, and how their verdict is to be given.</i>	293
Chap. XLII. <i>Concerning the misdemeanors of jurors, and their punishment.</i>	306
Chap. XLIII. <i>Concerning standing mute, and the punishment of penance, or peine fort & dure.</i>	314
Chap. XLIV. <i>Concerning clergy, how it stood at common law, and how generally at this day.</i>	323
Chap. XLV. <i>In what offenses clergy is allowable or not.</i>	330
Chap. XLVI. <i>Where and in what offenses, that were capital at common law, clergy is taken away in part or in whole, by acts of parliament subsequent to 25 E. 3. and first of petit treason.</i>	334
Chap. XLVII. <i>Concerning the alteration made by several statutes in cases of murder, manslaughter, rape, and wilful burning of houses or barns with corn.</i>	343
Chap. XLVIII. <i>Concerning clergy in robbery from the house, or robbery from the person.</i>	348
Chap. XLIX. <i>Concerning clergy in burglary.</i>	360
Chap. L. <i>Concerning clergy in simple larciny and other felonies.</i>	364
Chap. LI. <i>What persons are or are not capable of clergy.</i>	371
Chap. LII. <i>At what time clergy is to be allowed.</i>	377

Chap. LIII.

A TABLE OF THE SEVERAL CHAPTERS, &c.

Chap. LIII. <i>Concerning the manner how, and the Judge by and before whom clergy is to be prayed or allowed.</i>	Page 380
Chap. LIV. <i>Concerning the consequences of clergy granted or prayed.</i>	382
Chap. LV. <i>Concerning judgments in the several kinds of capital offenses.</i>	391
Chap. LVI. <i>Concerning giving of judgment, by whom, and when.</i>	401
Chap. LVII. <i>Concerning executions.</i>	406
Chap. LVIII. <i>Concerning reprieves before or after judgment.</i>	412

HISTORIA

HISTORIA PLACITORUM CORONÆ.

PART II.

CHAP. I.

Touching the king's bench.

HAVING gone through the several kinds of capital offenses, I should now, according to my first proposed method, proceed to the enumerating and considering of offenses that are not capital; but I shall reserve that for the third part of this tractate.

1. Because the subject thereof is very large, numerous and various, and would exhaust too much of that time I have or can spend from other employments.

2. Because the method, order and rules of proceeding in capital causes, is different from any other course of proceeding in other criminal causes, and hath an appropriate method of proceeding by law consigned to it, and therefore they are fittest to be handled together.

And in this business I shall proceed in things as they arise in the order of proceeding in capital causes: *First*, I shall take a very brief account of the courts and jurisdictions wherein [2] they are to be decided; and this I shall not do at large, but so far forth only as it relates to proceedings in capital causes: and when I have briefly passed over that, then, *secondly*, I shall proceed with the whole tract of proceeding in criminal causes, from the first pursuit of the offender to his execution; as, namely, arrest, process, out-

lawry, arraignment, pleading, challenge, trial, clergy, sanctuary, judgment, reprieve, execution, &c. in the very same order as a course of proceeding in capital causes lies.

I. I begin with the jurisdictions, wherein causes of this nature are handled.

And altho the court of parliament is the highest court in this kingdom, and a court wherein proceedings capital have been often heard and determined, yet I shall decline that business, 1. Because the course of proceeding in parliament is in a different method and order, than what is used in other ordinary courts. 2. Because the instances are many and various, and will take up a volume to give an account of them. 3. Because I have elsewhere gathered up some observations of that kind already.

The highest ordinary court of justice next to the court of parliament. is the court of king's bench; I shall not at large pursue the jurisdiction of this court, for it hath been done to my hands amply already (a).

But I shall only consider it with relation to capital proceedings, namely, treasons and felonies, and that very briefly; and therein, 1. Concerning the jurisdiction of the court in this particular. 2. Concerning the power of the judges of this court out of court, in relation to matters of crime or misdemeanor.

The court of king's bench consists of two kinds of jurisdictions, viz. the civil jurisdiction or the plea-side, and the criminal jurisdiction or the crown-side.

Till the time of Edward II. the matters of both kinds were entered promiscuously in the rolls; but then the rolls were discriminated, and those of the crown-side, entitled *Rex*, tho. both were filed up together in the same bundles.

And thus it continued very long, but of later times the records of the pleas are bound up by themselves, and the records of the pleas of the crown bound up by themselves, and kept in the crown-office, under the immediate custody of the coroner of the king's bench, who is also the king's attorney in that court, and clerk of the crown.

In cases criminal, the court of king's bench have a different kind of proceeding touching offenses arising in the same county where they sit, and offenses in other counties, and removed before them by *Certiorari*.

(a) By lord Coke, 4 *Inst.* cap. 7.

In the county where the court sits, there is every term a grand inquest, who are to present all matters criminal arising within that county, and then the same court proceeds upon indictment so taken; or if in the vacation-time there be any indictment of felony before the justices of the peace, *oyer and terminer*, or gaol-delivery there sitting, it may be removed by *Certiorari* into the king's bench, and they may proceed *de die in diem*, and there need not be fifteen days between the *Teste* and return of the *Venire facias*, because the offense ariseth in the same county.

But if an indictment of felony be removed out of another county than where the king's bench sits, and the prisoner comes in either *gratis*, or by *Habeas Corpus*, or process, there must be fifteen days between the *Teste* and the return of the *Venire facias*. 9 Co. Rep. 118. b. lord Sanchar's case.

At common law, if a record of an indictment, or other thing come into the court before the filing thereof, the court may remand it; for 'till it be filed it is no record of the court; but if it be once filed, it is not to be remanded.

But if the issue be joined, the transcript may be sent down to be tried by *Nisi prius*; but the original record remains in the king's bench. 5 Martiæ, B. Coron. 231.

But by the statute of 6 H. 8. cap. 6. in cases of indictments of murder, or other felony removed into that court, the court may remand the indictments, and the bodies of the prisoners to the justices of the peace, gaol-delivery, and other justices, where the felony was committed, commanding them to proceed there- [4] upon, as if the prisoner or indictment had never been removed.

The court of king's bench is in the county where it sits, a court in eyre and more, 27 Affiz. 1. and also the sovereign court of gaol-delivery and *oyer and terminer*. 9 Co. Rep. 118. a. lord Sanchar's case.

And therefore when the court of king's bench comes into any county, there can be no session of the commission of gaol-delivery, or *oyer and terminer*, or peace during the term-time, while the court sits; it doth not determine the commission, but suspends their session during the term; for in the vacation-time, they may proceed again upon their former commission, and so it is not like a new commission, which after publication supercedes the former, *de quo infra*, lord Sanchar's case, *ubi supra*.

4 HISTORIA PLACITORUM CORONÆ.

But if an indictment be found before commissioners of *oyer and terminer* in the vacation-time in the county where the king's bench sits, or in any other county in term or vacation, there may issue a special commission to determine that indictment, with a writ to the former commissioners to deliver it to the new commissioners; and these special commissioners may sit in the term-time in the county where the king's bench sits; but then the king's bench must adjourn during that session of this special commission: ruled in Sir *Walter Rawleigh's* case, *M. 1 Jac. Co. P. C. cap. 2. p. 27. Dyer 286. b. Plowd. Com. 390.* earl of *Leicester's* case, wherein is the whole order of such commission. *4 Co. Instit. p. 73.*

The court of king's bench is the sovereign court of *oyer and terminer*, therefore tho some acts limit proceedings in some criminal causes to the justices of *oyer and terminer*, yet the king's bench may proceed upon them; but justices of peace cannot, as upon *5 Eliz. cap. 14.* for forgery, *8 H. 6. cap. 12.* stealing records, &c.

If a person attainted in the country be removed by *Habeas Corpus*, and the record removed also by *Certiorari*, this court may award execution. *M. 5 Car. 1. B. R. Coxe's case (b).*

[5] This court is also the sovereign coroner of *England*, and therefore may take appeals of death, &c. by bill. *4 Co. Instit. p. 73.*

Where judgment of death is given in the king's bench, the execution is to be made by the marshal of the court; for the prisoner is supposed to be *in custodia marescalli*; and the entry is always, *Et præceptum est marescallo, &c. quòd faciat executionem periculo incumbente; quod vide Co. Entries in title Indictment, per totum*; but there may be a mandate to the sheriff of the county wherein execution is to be made, to be assisting; and thus it was done in *H. 24 Car. 2.* in the case of *Brown*, who had judgment of death in the king's bench for a felony committed in *Middlesex*, and executed by the marshal in *Surrey*, because the prison was there; but he might have done it in *Middlesex*, for he is a minister of the king's bench in each county; and so it might be, tho the felony had been done in any foreign county removed by *Certiorari (c).*

By the statute of *33 H. 8. cap. 12.* felonies, &c. within the king's palace are made triable before the lord steward, and a special order

(b) *Cro. Car. 176.*

(c) Thus it was done in *Althoe's case*

before mentioned, *Part I. p. 464.*

of trial directed by that statute, namely, by the king's servants in his chequer-roll; yet for a felony within the king's palace, if the king's bench be sitting in the same county, the proceeding may be in the king's bench; for the statute of 33 *H.* 8. being in the affirmative is not exclusive of the king's bench for felonies that were before that, 10 *Co. Rep.* 73. *b.* But indeed where a felony is *de novo* created, and with it a new special form of proceeding, as by the statute of 3 *H.* 7. *cap.* 14. for conspiring the death of the king, &c. it is not triable in the king's bench, nor in any other form than is limited by that act. *M.* 20 *Jac.* *B. R.* *Castle's case* (*d*).

Now concerning the justices of the king's bench.

They are in their persons conservators of the peace throughout *England* without any other commission; and any of them may issue out their warrants for apprehending of a malefactor, or for surety of the peace in any county of *England*, namely, to [6] apprehend and bring him before a justice of peace in the county where he is apprehended; and this warrant is directed under their hand and seal to sheriffs, constables, and other officers. Each judge of that court hath a tipstaff attending him, being a deputy to the marshal for the execution of his office in that special service; and the chief justice, or any one of the other judges of that court, may by the custom of that court, *ore tenus*, command the tipstaff to apprehend any person for matters of misdemeanors relating to the court, or other misdemeanors, and bring him before him, and such arrest is justifiable without any other warrant, and without shewing the cause. *T.* 11 *Car.* *B. R.* 2 *Rol. Abr.* p. 558. *Throgmorton and Allen.*

The chief justice of the king's bench is not *that Justiciarius Angliæ* which was antiently in use; for *that Justiciarius Angliæ* had, in effect, all the jurisdiction both civil and criminal, that is in the king's bench, chancery, common pleas, and exchequer, and might and did sit in any of those courts as the chief judge of them, as appears by many evident instances.

But the chief justice of the king's bench hath in the court of king's bench, as one of the judges thereof, that part of the jurisdiction of the *Justiciarius Angliæ*, which concerns criminal causes, and the inspection and reformation of the judgments of other courts.

It is true he is frequently called chief justice of *England*, because he presides in that court where the *Justiciarius Angliæ* did most fre-

(*d*) *Cro. Jac.* 463.

quently and naturally sit as the king's deputy in administration of justice; but it is a misconclusion that therefore he is *that Magnus Justiciarius Angliæ*, which was in use before the time of Henry III.

He is created by writ, and always was; but the *Justiciarius Angliæ* by patent.

3 Blackf. Com. ch. 4. p. 41. 4 Blackf. Com. ch. 19. p. 265. 2 Hawk. P. C. ch. 3.

[7]

C H A P. II.

Concerning the courts before the lord high steward, and the steward of his majesty's household.

TOUCHING the *former* of these, it is instituted for the trial of peers of the realm: more cannot be said touching it, than is already said by my lord Coke, 4 *Inst. cap. 4. Co. P. C. cap. 2. p. 28. & sequentibus*, and because it doth not concern the usual and common proceedings against common persons, I shall dismiss it.

Touching the *second*, namely, the proceeding before the lord steward of the household, &c. for treasons, and murder, and manslaughter, and larciny done within the king's palace.

This court is established, and the method of proceeding therein punctually delivered by the statute of 33 *H. 8. cap. 12.* which will not need much explanation, only these things are considerable therein.

1. As to their power of hearing and determining treasons in that court, it seems to be wholly abrogated and repealed by the statute of 1 & 2 *P. & M. cap. 10.*

2. Whereas by that act, clergy is taken away in cases of manslaughter, felonious stealing of goods in the king's house of the value of twelve-pence; it seems to me clergy is restored in these cases by the act of 1 *E. 6. cap. 12.* tho the party be convicted according to the statute of 33 *H. 8.*

3. Whereas breaking of the king's house with intent to steal, is made felony by that statute without benefit of clergy, *that* breaking of the king's house is become no felony by the statute of 1 *E. 6. cap. 12.* and 1 *Mar. cap. 1.* tho he be arraigned before the steward of the *Marshalsea* according to that act.

4. The

4. The offense of felonious stealing of the king's goods of the value of twelve-pence, or breaking the king's house to steal the goods, is limited by that act to be tried before the steward of the *Marshalsea*, and others associated to him by the statute, but not before the lord steward, or treasurer, or comptroller of the household, as manslaughter or murder is directed to be tried or determined by that statute, nor by the king's servants.

5. It seems to me, that by the direction of that act the proceeding of the lord steward, or steward of the *Marshalsea*, is to be by a session within the king's house or palace where the felony is committed; and that statute limits the precinct of the king's palace for that purpose, *viz. within any edifices, places, courts, gardens, orchards, privy-walks, tilt-yards, wood-yards, tennis-plays, cock-fights, bowling alleys, near adjoining to any of the houses aforesaid, and being part of the same, or within 200 foot of the standard of any outward gate, or gates of any of the houses above rehearsed, commonly used for any passage out of, or from any of the houses above rehearsed.*

And therefore if it is considerable, whether as to this purpose, *viz.* for trial of felonies within the king's palace, the extent of the king's palace of *Whitehall* limited, or rather extended by the act of 28 H. 8. cap. 12. be not restrained; for by that statute that new palace of *Whitehall*, the old palace of *Westminster*, *St. James's park*, and the street leading from *Charing-Cross* to the sanctuary-gate of *Westminster*, and all the houses and buildings on both sides of the street from the *Cross* to *Westminster-hall*, and between the water of *Thames* on the east and the park-wall on the west, and all the soil of the old palace are made parcel of the new palace.

Upon this doubt I did advise, that the lord steward upon a late occasion upon this act should not sit in *Westminster-hall*, but in *White-hall*, according to the restriction of the statute of 33 H. 8. which was after the statute of 28 H. 8. and seems as to this purpose to restrain it; but this advice was not followed, for he sat in *Westminster-hall*.

Atho this act erects a new kind of jurisdiction, and that without any commission, yet it being an act in the affirmative, it doth not exclude the jurisdiction of the king's bench, nor of commissioners of *oyer and terminer* to hear and determine these offenses, tho committed in the king's palace, especially that commission

of *oyer* and *terminer*, which hath been usually granted to determine felonies and treasons within the verge, and particularly within the king's palaces; and therefore, tho this act of 33 *H. 8. cap. 12.* hath been long since made, and is a commission of itself to the lord steward, and in his absence to the treasurer and comptroller of the household, yet till this year I never knew nor heard of any session upon this statute: but the whole business of this nature was transacted in the king's bench, or by *that* antient and special commission of *oyer* and *terminer* for offenses within the verge, which commonly also had in it a commission of gaol-delivery, and was usually directed to the lord steward, lord chancellor, treasurer, justices, &c. whereof we may see the precedent, 4 *Co. Rep. Holcroft's case (a)*, the record whereof is at large, *New Entries, fol. 54. (b)* in an appeal, where it appears by the indictment, that the manslaughter was committed *infra hospitium domini regis de Hampton-Court*, yet the inquisition was found by the coroner, and the party tried before the commissioners of *oyer* and *terminer* and gaol-delivery for the verge, and not before the lord steward, by force of the act of 33 *H. 8.* and adjudged good.

And there it is also resolved 4 *Co. Rep. Wrot's case (c)* and *Swift's case (d)*, that as the commissioners of gaol-delivery and *oyer* and *terminer* for the verge, have power to hear and determine felonies done in the king's palace, so the king's bench or general commissioners of *oyer* and *terminer* or gaol-delivery, and justices of peace for the county, have power to hear and determine any felony committed within the verge, so that they have all a concurrent jurisdiction, namely, the

[10] lord steward, commissioners of *oyer* and *terminer* and gaol-delivery for the verge, commissioners of *oyer* and *terminer*, gaol-delivery and peace for the county at large, tho the offense were committed in the king's palace.

(a) 4 *Co. 45. b.* (b) This is *Co. Entries. 53. b.* (c) 4 *Co. 46. b.* (d) *Ibid.*

4 *Blackf. Com. ch. 19. p. 261. 276.* 2 *Hawk. P. C. 5. 7.*

CHAP. III.

Touching special commissions of oyer and terminer, and their kinds and power.

COMMISSIONS of *oyer* and *terminer* are of two kinds, special, or general for a whole county.

Special commissions are of several kinds. 1. Commissions of *oyer* and *terminer* for the verge. 2. For crimes done upon the sea by the statute of 28 *H. 8. cap. 15.* 3. Commissions for particular places, that are not counties. 4. Commissions to hear and determine particular facts. 5. Commissions to hear or enquire, and not determine. 6. Commissions to determine, and not enquire.

I. Touching commissions of *oyer* and *terminer* for the verge, *viz.* within twelve miles of the king's court somewhat hath been before said; I shall add farther,

1. That by virtue of that commission they have power to inquire and determine felonies and murders done within the king's house. 2. And these they are to proceed upon, not according to the direction given to the lord steward, *viz.* by the king's yeomen officers, tho there is a grand inquest of them also; but by the good men of the county, wherein the offense was committed, whether it be committed in the palace, or elsewhere within the verge. 3. Tho the commission extend into several counties; namely, any that are within twelve miles of the tenet of the king's hall, yet they are to hold their sessions in any county within the verge, and a precept issues [11] to the knight marshal to impanel a grand inquest out of every county within the verge, of the men of those counties to appear where they sit, and there to inquire and try the offenses committed in that county. 4. That they can only proceed upon indictments taken before themselves, and therefore cannot proceed upon a coroner's inquest; and to remedy that inconvenience, they have always, or at least should have in the same commission, a commission of gaol-delivery; and by virtue of that part of their commission they may proceed upon the coroner's inquest; *vide Co. Entries* 54. in *Holcroft's* case. 5. It seems to me, that if a special commission for the verge issue, which possibly may extend to *Middlesex, Surry, and Hertford*, if a general commission of *oyer* and *terminer* in the county of *Middlesex* issue
after

after *that*, with notice to the commissioners for the verge, it determines their commission of *oyer* and *terminer* as to *Middlesex*, but not as to the other counties; and so for a general commission of gaol-delivery; for this is not aided by the statute of 2 & 3 P. & M. cap. 18. for that preserves only the commissions granted to cities and boroughs. 6. And *à converso*, if a general commission of *oyer* and *terminer*, or gaol delivery for the county issue, and then afterwards a like commission issue for the verge, notice thereof, or session by the commission for the verge determines the general commission as to so much of the county, as is within the precinct of the verge; see the whole procedure, *Coke's Entries* p. 54, 55.

Tho commissions for the verge have often issued, I do not remember any session since about 8 Car. 1. for the businesses that fall within their cognizance, are as well and effectually dispatched in the king's bench, or by general commission of gaol-delivery, and *oyer* and *terminer* in the several counties at large; *quod vide* 10 Co. Rep. 73. b. the case of the *Marshalsea*, 4 Co. Rep. *Wrott* and *Wigg's* case, and *Holcroft's* case there cited; only indeed the coroner of the verge is a necessary officer; *de quo postea*.

But the original power of the steward and marshal touching felonies [12] within the verge, tho I know nothing that hath expressly taken it away, yet by *disuser* is in effect vanished, and that jurisdiction is wholly exercised by this special commission of *oyer* and *terminer*, or in the king's bench, or general justices of *oyer* and *terminer* or gaol-delivery at large, who have jurisdiction of such felonies, tho committed within the verge; *vide Coke super statut. Articuli super Cartas*, cap. 3 & 10 Co. Rep. *le case de Marshalsea*.

II. The second kind of special commission of *oyer* and *terminer*, is, that which is founded upon the statute of 28 H. 8. cap. 15. for offenses upon the sea, or in great rivers below the bridges.

I shall not enter into a large description of the admiral's jurisdiction, but only set down briefly some observations in relation to capital offenses, because I have elsewhere more at large examined it.

As to criminal causes, that are capital, as treasons, felonies, &c. there is a threefold jurisdiction relative to the admiral and court of admiralty.

1. Its primitive and original jurisdiction, and this was of treasons, felonies, or piracies done upon the high sea, which was sometimes held before the admiral, or his lieutenant as such without relation to any

any other commission; and sometimes by special commission under the great seal, even whether there was an admiral in being or not.

The rule of their proceeding was *secundum legem maritimam*, their trial by proofs; and therefore, though they did proceed oftentimes to sentence of death, and executed it, yet in as much as the proceeding was according to the course of the civil and marine laws, and not according to the common law, it worked no corruption of blood.

Tho their jurisdiction was of things done upon the high sea, yet they might hold their session in any place upon land.

And altho at this day it is commonly received, that the courts of the common law have no jurisdiction of felonies committed upon the high sea, yet most certainly the king's bench had usually cognizance of felonies and treasons done upon the narrow seas, tho out of the bodies of counties, and it was presented and tried by men of the adjacent counties. *T. 18 E. 2. Rot. 18. Rex. Glouc. [13] & Somers'. M. 26 E. 3. Rot. 51. Norfolk. T. 34 E. 1. coram Rege. Rot. 34. Norfolk. T. 8 E. 2. ibidem Rot. 111. M. 18 E. 2. Rot. 15. M. 19 E. 2. Rot. 17. Rex. T. 25 E. 3. Rot. 22. Linc. M. 27 E. 3. Rot. 29. Rex. (a). 8 E. 2. Coron. 399. 40 Affiz. 25.* So that the

court

(a) The cases referred to here by lord Hale, as proofs of the antient jurisdiction of the king's bench in offenses done upon the seas, were as follow:

Trin. 18 E. 2. Rot. 18 Rex. Several persons of *Bristol* had been indicted before the admiral of the king's flota, "per inquisitionem de mandato regis inde factam, per sacramentum marinariorum, quod vi & armis, & felonice deprædati fuerunt navem de *Placentia* in alto mari, inter *Le Ras sancti Martini, & Odyern'*, de bonis & mercimoniis, &c." The indictment was returned into chancery, and a writ issued to the sheriff of *Gloucestershire* to attach the said persons, and bring them *coram seipso* and the mayor of *Bristol* & *audita querela*, to do justice to the merchants, "super recuperatione bonorum secundum legem mercatoriam, & nihilominus malefactores, prædictos in prisona salvo custodiri facere," till they should be delivered by course of law. The sheriff neglecting to execute effectually what was enjoined him by the said writ, a second writ was directed to the mayor of *Bristol*, "Quod præmissa omnia & singula diligenter & efficaciter faceret, &c." Afterwards *processus totius negotii prædicti* was brought *coram rege*, by which it appears, that one *Clement Turtle* had been impleaded before

the said mayor, by the master of the ship, &c. "Quod habuit ad partem suam de bonis deprædati ad valentiam 25. in justè, &c. Et hoc parati sunt verificare per mercatores & marinarios villæ prædictæ." *Turtle* pleaded not guilty, and was acquitted by a jury of merchants and mariners; the which jury *ex officio* again indicted the same persons, who had before been indicted "coram admirallo flotæ, quod navem prædictam de bonis, &c. felonice deprædarunt," and thereupon a *capias* issued to the sheriff to bring them *coram Rege ubicunque*, &c. to answer for the said crime, &c.

Mitch. 26 E. 3. Rot. 51. in dorso. coram Rege. Norfolk. *John Selondere* impleaded several persons, *de placito transgressionis per billam*, for entering his ship *super costerum maris de North'lenn'*, beating and wounding him, and plundering the ship, *quam in mari prædicta reliquerunt in desperatam, per quod navis prædicta periit omnino*; and recover'd 360 marks against them, for the damages sustained thereby.

Trin. 34 E. 1. Rot. 34. coram Rege. Norfolk. Several merchants of *Lincoln* put on board a ship wool and other commodities for *Brabant*, to the value of 896l. 10s. The ship in its passage was entered in a hostile manner in the port of *Gerfet* in *Zealand*,

and

court of king's bench had certainly a concurrent jurisdiction with the admiralty, in cases of felonies done upon the nar-

row

and plundered by the subjects of the earl of *Hainault*: satisfaction had been demanded of the earl for this depredation in vain; and thereupon, at the suit of the said merchants of *Lincoln*, a writ was directed to the bailiffs of *Lynn* to seize *omnia bona*, &c. of the merchants of *Hainault*, and keep them till the *Lincoln* merchants had received satisfaction, or till farther order should be taken therein. To this writ the bailiffs returned, that the *Hainault* merchants had *nulla bona infra ballivam suam*: upon this a *Lincoln* merchant came into chancery, and alledged, that seizure had been made of goods to the value of 31*l.* 17*s.* by the said bailiffs, which they had redelivered to the *Hainault* merchants without warrant, and thereupon a second writ issued to the said bailiffs, ordering them to pay *inailatè* the said 31*l.* 17*s.* to the *Lincoln* merchants in part of their loss, or else to appear *coram Rege in octabis Trin. ubicunque*, & interim to seize *omnia bona*, &c. of the *Hainault* merchants, as before. It appears afterwards, *Mich.* 15 *E.* 2. *Rot.* 142. *coram Rege*, that the said earl of *Hainault* in the parliament, anno 4 *E.* 2 acknowledged himself *per nuncios suos*, to be indebted to the *Lincoln* merchants in the sum of 954*l.* on account of this depredation; 70*l.* of which was allotted to *Walter le Ken* one of them, in satisfaction for his loss; and at his suit a writ was directed to the sheriff, *quod levare faceret 70 libras de bonis*, &c. of the *Hainault* merchants, arrested by consent of the said earl of *Hainault* at *Yarmouth*, and bring the money into chancery, *ad satisfaciendum prædicto Waltero le Ken*: by virtue of which several sums of money were paid to him, *in parte debiti prædicti*.

Trin. 8 *E.* 2. 111. *in dorso. coram Rege. Kanc'*. A mandate issues to the constable of *Dover*, and warden of the cinque-ports, to take into custody several persons, for entering a ship from *Flanders vi & armis*, laden with cloth and other goods, belonging to certain merchants of *Ipres*, "quos pannos abduxerunt, & mercatores ligaverunt, & imprisonaverunt, &c. ita quòd habeat eos coram rege ad respondendum præfatis mercatoribus super præmissis, &c."

Mitch. 18 *E.* 2. *Rot.* 25. *in dorso. coram Rege. Lincoln'*. The mayor and commonalty of *Grymesby* implead several persons "pro carcandis & discarcondis navibus apud Villam de Cle, infra quatuor leucas villæ de Grymesby," whereby the said corporation was endamaged, and lost the custom due to them on all goods and merchandise,

"carcata, seu discarcata, infra quinque leucas villæ de Grymesby, in auxilium firmæ suæ de rege," and a precept issues to the sheriff to attach, and bring them *coram Rege*, to answer for the said offenses.

Mich. 12 *E.* 2. *Rot.* 17. *Rex*. The king signifies by writ to the justices of his bench, that precepts had issued to several sheriffs to attach certain persons, "quorum nomina sub pede sigilli sui eis misit, qui durante sufferentia inter subditos regis Angliæ, & comitis Flandriæ, quandam navem de Flandria diversis bonis & mercimoniis, ad valorem 2000 marcarum, carcatam, infra aquam de Tyne prope Tynemuth, vi armatâ ceperunt, & bona & mercimonia prædicta, &c. inter se partiti fuerunt." In consequence of which process it appears, *Rot.* 18. *ibidem*, that several persons were brought *coram Rege* by the sheriff of *Northumberland*; where they were impleaded by the king's attorney for having part of the said goods, "Et dicunt quòd nihil ceperunt, &c. Et de hoc ponunt se super patriam." Upon which the king's attorney joined issue with them, and the court bailed them *de die in diem, quousque*, &c.

Trin. 25 *E.* 3. *Rot.* 22. *Lincoln Rex*, *William Coupeman* and *Robert Fitz-William* had been indicted, "coram vicecomite & custodibus pacis in comitatu Linc' Quòd felonice deprædaverunt Johannem Gryme de Kirkeby, in mari apud Freston-bord; et quòd de Freston-bord porrexerunt supra mare versus partes boreales, & in alto mari deprædaverunt, & demerserunt octo batellas piscatorum, & sex homines in prædictis batellis existentes, felonice interfecerunt." The indictments were sent into the king's bench, and thereupon the said *William* and *Robert* were brought *coram Rege apud Aylesbury*, and responding, &c." But it appearing that both of them had been tried upon the said indictments before the justices of gaol-delivery at *Lincoln*, and acquitted; "Consideratum est quòd iidem Robertus & Wilhelmus eant inde quieti."

Mich. 27 *E.* 3. *Rot.* 29. *Rex. London*. *Henry Pickard*, coroner of *London*, delivered with his own hand *coram Rege*, quosdam cognitiones *coram ipso factas* in the Tower of *London* by several persons, who confessed that they had feloniously entered a ship near *Fewersham*, thrown the men on board it into the sea, plundered it, and then sunk it; that they afterwards went from *Waxeryngg usque apud foolongg de Tenet*, and feloniously entered another ship there, stripped,

row seas or coast, though it were high seas, because within the king's realm of *England*.

And as it was thus in the king's bench, so in this case special commissions to hear and determine offenses upon the coast, *secundum legem & consuetudinem regni Angliæ*, did often issue.

But indeed a general commission of *oyer and terminer* of felonies *infra comitatum*, &c. did not extend to misdemeanors upon the sea-coast, unless in those creeks and rivers and arms of the sea, that were within the body of the county.

So that even in these cases of felonies or treasons committed upon the sea-coast in the narrow seas, the king's bench or special commissions of *oyer and terminer secundum legem & consuetudinem regni Angliæ*, had a concurrent jurisdiction with the court of admiralty.

But this jurisdiction of the common law courts in cases of felonies and treasons, and other crimes committed upon the sea-coast, was interrupted by a special order of the king and his council, *Claus. 35 E. 3. m. 28. dorso*, and by a *Supersedeas* that issued shortly after; and since 38 *E. 3.* I have not observed, that the king's bench, or courts of the common law have proceeded criminally in cases of crimes of this nature committed upon the high sea.

But if any felony or treason was committed within any creek or arm of the sea, which was within the body of a county, the courts of the common law only had jurisdiction in such cases, and the admiral had no jurisdiction at the common law in such cases.

And thus far touching the jurisdiction of the admiral or [16] maritime court at common law.

2. But by the statute of 15 *R. 2, cap. 3.* of the death of a man, or maihem in great ships hovering in the main stream of great rivers *below the bridges* (for so is the record, and not *below the points*) nigh to the sea, the admiral shall have jurisdiction.

ped it of what goods were on board, killed all that were in it except two women, and flung them into the sea; "Et quòd
"fornicaverunt cum duabus mulieribus
"prædictis, quas quidem post tres dies
"elapsos felonice interfecerunt." Upon this four of the said criminals were immediately brought *coram Rege*; and being asked severally, why judgment should not pass upon them, "juxta cognitiones suas
"prædictas, nihil dicunt. Ideò consider-
"atum est, quòd trahantur, & suspendan-
"tur," As to two others, "quia curia

"nondum advisatur de procedendo ad
"judicium super eis," they were committed to the marshal, and afterwards removed to *Newgate* by the king's writ, being appealed, "coram Vic' & Coron'
"Civitatis London, by Allan de Crendon,
"de morte Thomæ de Crendon fratris sui,
"apud le forlonges in mari juxta insulam
"de Teneto in com' Kane' felonice inter-
"fecti, super appello prædicto, secundum
"legem & consuetudinem regni Angliæ,
"responsuri."

This

This first gave the admiral jurisdiction in any river or creek within the body of the county, which only extends to the death of a man and maihem.

But yet observe, this is not exclusive of the courts of common law; and therefore the king's bench, or the general commission of *oyer and terminer* to hear and determine felonies, &c. in the county, have herein a concurrent jurisdiction with the court of admiralty.

And as well the coroner of the county, as of the admiral, may take inquisitions upon such deaths happening in great rivers, namely, arms of the sea, that flow and reflow beneath the first bridges. 8 E. 2. *Coron.* 399.

Only these things are observable. 1. That it extends only to rivers, that are arms of the sea, namely, that flow and reflow, and bear great ships. 2. It seems to extend only to such deaths as happen in those great ships, not in small vessels. 3. That by that statute this jurisdiction is annexed to the court of admiralty, and consequently they may proceed therein by proofs, according to the course of the marine law, and hold their session where they please, tho they did often, even before the statute of 28 H. 8. proceed by commission under the great seal, and by inquisition.

3. By the statute of 28 H. 8. *cap.* 15. the course of proceeding in criminal causes is settled in a different method, in which these things are observable, *viz.* 1. The things to which it extends, *treasons, felonies, robberies, murders, and confederacies.* 2. Where committed, *viz. in and upon the sea, or in any other haven, creek, river, or place, where the admiral hath, or pretends to have power, authority, or jurisdiction:* This seems to me to extend to great rivers, where the sea

[17] flows and reflows below the first bridges, and also in creeks of the sea at full water, where the sea flows and reflows, and upon high water upon the shore, tho these possibly be within the body of the county, for there, at least by the statute of 15 R. 2. they have a jurisdiction, and thus accordingly it hath been constantly used in all times, even when judges of the common law have been named and sat in their commission; but we are not to extend the words (*pretend to have*) to such a pretense as is without any right at all, and therefore, altho the admiral pretends to have jurisdiction upon the shore, when the water is reflowed, yet he hath no cognizance of a felony committed there; and therefore it was resolved, 25 Eliz. *Lacie's case*, That if a man be stricken upon the high sea, and die upon

upon the shore after the reflux of the water, the admiral by virtue of this commission hath no cognizance of that felony. 2 *Co. Rep. f. 93. a. Bingham's case, 5 Co. Rep. f. 107. a. Constable's case, Co. P. C. cap. 7. p. 48.* but of this hereafter. 3. The commission must be directed to the lord admiral or his lieutenant, and three or four others. 4. The proceeding and trial is to be according to the course of the common law, as if the offense were committed at land within the realm. 5. Their session is to be in such places and counties as shall be appointed by the king's commission; no challenge for default of hundreders. 6. The offender excluded from clergy; but *quare*, whether the statute of 1 *E. 6. cap. 12.* does not restore it even in this case, as some of the judges in *Alexander Poulter's case (d)* held? But my lord *Coke, P. C. cap. 49.* saith piracy is excluded from clergy: It seems to me, that as to all offenses but treason, and piracy, and murder, the offender is to have his clergy by the statute of 1 *E. 6. cap. 12.* 7. The hearing and determining being directed to be according to the course of the common law, if the prisoner stands mute, he shall have *peine fort & dure. Co. P. C. cap. 49. p. 114.* 8. This statute is not repealed by the statute of 35 *H. 8. cap. 2.* nor by the statute of 1 & 2 *P. & M. cap. 10.* 9. An accessory cannot be punished by this act, but may be punished by the admiral according to the marine or civil law. 10. An attainder upon this act [18] worketh no corruption of blood.

Thus far in general of this commission; only I shall add,

1. That touching piracy upon the sea at this day, it is commonly taken the common law hath no concurrent jurisdiction; and therefore if an accessory be at land to a piracy at sea, the commissioners upon this statute cannot try it because done at land, and besides the statute extends only to principals. *Co. P. C. p. 112.* nor can the common law try it, because piracy is not made felony, whereof the common law can take notice; Again, if *A.* commit a robbery at sea, and brings the goods to land within the body of a county, this is not felony triable by the common law, because the common law takes no notice of the original fact. *Co. P. C. p. 113. Butler's case cited 28 Eliz.*

2. That touching treason or felony committed upon the high sea, as the law now stands, it is not determinable by the common law courts, but only upon this statute.

(d) 11 *Co. 31. b.*

3. But if a felony be committed in a navigable arm of the sea, the common law hath a concurrent jurisdiction.

But *note* well, that besides this commission founded upon the statute of 28 *H.* 8. which extendeth only to treason, murder, robbery, and confederacies, there is, and for above these hundred years last past there hath been in the same commission, a common law commission of *oyer* and *terminer*, and also a commission of the peace and gaol-delivery for all offenses against any penal laws *super mare, vel infra fluxum maris ad plenitudinem maris*; and also of all treasons, murders, felonies, &c. *super mari vel aliquo rivo, portu, aqua dulci, creca, seu infra fluxum maris ad plenitudinem maris, à quibuscunque primis pontibus versus mare & super littus maris, &c. secundum stylum & consuetudinem regni Angliæ & curiæ admiralitatis*, and limits the county of their session and inquiry. This may be seen at large in 25 *Eliz.* in *Lacie's* case. (e).

But then for so much as lies within the body of any county, their [19] commission is a commission of the peace, gaol-delivery, and *oyer* and *terminer*, and consequently plain commissions at common law, and their sessions ought to be within the county where the fact inquirable is to be inquired, because it is but a special commission at common law.

The case of *Lacy* was thus:

Die Lunæ in quartâ septimanâ Quadragesimæ 23 Eliz. at the castle of *York*, there was a general session by commission of gaol-delivery and *oyer* and *terminer* for the county of *York* directed to baron *Chute* and others.

At this session *Ambrose Lacy* and others were indicted of the murder of *Richard Peacock*, supposing the stroke given 5 *August 22 Eliz.* and the death 6 *August 22 Eliz.* both supposed to be at *Scarborough*, in *commitatû Eboracensi*.

This indictment was delivered into the king's bench *in mense Martii* following, and *Lacy* appearing in the king's bench was thereupon arraigned: he pleaded that the place, where *Richard* was stricken and after died, was called *Scarborough-sands*, and that it is and at the time of the stroke & *continuè postea fuit locus infra fluxum & refluxum maris infra plenitudinem ejus in Scarborough prædict'*, & *parcella portûs de Scarborough*, and that within that place the admirals 28 *H.* 8. & *semper tam antea, quam postea habebant & prætendebant habere juris-*

ditionem; then shews the letters patents of *oyer and terminer* to baron *Chute* and others within the counties of *York, &c.* according to the usual form, which was delivered to baron *Chute* and the rest 18 Feb. 23 Eliz.

That afterwards 25 Feb. 23 Eliz. the commission upon the statute of 28 H. 8. including also the commission of gaol-delivery, *oyer and terminer*, and the peace, *ut supra*, issued to the earl of *Lincoln*, lord admiral, and divers others, *&c.* to inquire, hear and determine, and deliver the gaol of all murders *tàm super mare vel aliquo rivo, portu, aquâ dulci, crecâ, seu loco quocunque infra fluxum maris ad plenitudinem à quibuscunque primis pontibus versus mare, quàm super littus maris & alibi ubicunque infra jurisdictionem nostram maritimam & jurisdictionem curiæ admiralitatis, &c.*

That this commission was delivered to the lord admiral, *&c.* 26 Feb. 13 Eliz.

That afterward and before the inquisition before baron *Chute, &c.* the lord admiral gave notice to the said baron [20] *Chute* of that commission.

And that after that notice, *viz. 6 Martii in quartâ septimanâ Quadragesimæ* this inquisition was taken before baron *Chute, &c.* upon which he is now arraigned.

Then he shews, that 2 Martii 23 Eliz. the lord admiral, *&c.* issued their precept to the sheriff of *York* by virtue of the second commission, and thereupon an indictment was found, that *Ambrose Lacey* killed *Peacock se defendendo*, and set forth the special manner, and avers that it is the same death, and that the *locus, in quo* the stroke was given, was called *Scarborough-sands infra fluxum & refluxum maris ad plenitudinem ejus, & parcella portus de Scarborough*; and that the admiral 28 H. 8. *ac continuè postea & antea habebat vel pretendebat habere jurisdictionem, & sic dicit quòd inquisitio coram baron Chute fuit void.*

The king's attorney demurred, and Mich. 26 Eliz. judgment was given, *quòd eat sine die.*

Which judgment doth not at all enforce, that the admiral had jurisdiction by the statute of 28 H. 8. in this case, where a murder was committed in a port, or a stroke given at high sea, and a death upon the sands; but only this second commission extending so large, namely upon the sea-shore and in the ports, did for so much repeal the

former commission in the county at large; for *that* second commission was in part a common law commission, as hath been said.

And therefore I take it to be true, that if a man be stricken upon the shore at full sea, and die upon the shore at low water, this is not within the statute of 28 *H.* 8. nor within a general commission of *oyer* and *terminer* in the county, but yet I do not think it is to be determined by the constable and marshal, as my lord *Coke*, *ubi supra*, intimates, but it may be determined in the king's bench sitting in the county, where the party died, or by a special commission of *oyer* and *terminer*.

[21] III. The third kind of special commission is, that which is limited to particular places, that are not counties: Such are the commissions of *oyer* and *terminer*, and likewise of gaol-delivery, or the peace limited and granted within certain corporations or boroughs; nay, I think it may be granted to particular rivers, tho they extend to several counties, but then every county must have a particular session of its own, for so much of the river as is within the precinct of that county.

If the king issues a commission of *oyer* and *terminer* or gaol-delivery to any city or town not being a county, if a general commission afterwards issues for the whole county, this second commission after notice or a session by virtue thereof determined and superseded the special commission; but this is remedied by the statute of 2 & 3 *P. & M.* cap. 18. whereby it is enacted, that such a special commission shall not be determined by the granting or sitting of a general commission in the county at large.

IV. Special commissions of *oyer* and *terminer* may be made for some special offenses: And such were antiently very usual, as touching labourers, weights and measures, and the like; for as a general commission may be to hear and determine all offenses, so it may be for particular offenses.

V. Special commissions to hear and not to determine offenses: Tho by force of some particular statutes such commissions of inquiry may issue, as upon the statute of 23 *H.* 6. cap. 10. of sheriffs and some others, yet regularly as to matters of misdemeanor, especially such as are capital, as felony or treason, no such commission of inquiry only is warrantable: *Vide T. 5 Jac. 12 Co. Rep. p. 31.*

VI. A commission to determine and not to inquire: Regularly in all

all commissions *ad audiendum & terminandum* the commissioners ought to proceed upon indictments before themselves; *de quo infra*.

But it hath been not unusual in cases, especially of treason, that where an indictment is taken before justices of *oyer and terminer* for an offense committed in the proper county, a special commission may issue to determine that indictment in another county, but [22] then upon *not guilty* pleaded the same must be tried before these second commissioners, by men of the county where the offense was committed: *Vide Co. P. C. p. 27. Plowd. Com. 390. Casus com' Leicester and Somervill's case, &c. (f)*.

I shall not instance farther touching special commissions: Some acts of parliament have directed commissions of this nature, as upon the statute for treasons and felonies committed in another county by the statute of 33 *H. 8. cap. 23.* (which, tho repealed as to treasons by 1 & 2 *P. & M. cap. 10.* yet stands as to murders, and *vide Crompt. fol. 22. a. Grevill* examined before the council was arraigned for murder in another county upon this statute (*), and standing mute was pressed,) and upon the statute of 35 *H. 8. cap. 2.* of foreign treasons.

Et hæc dicta sunt de special commissions d' oyer and terminer.

See Index to 2 Hawk. P. C. tit Oyer and Terminer. 4 Blackf. Com. ch. 5. p. 71. Foster. 1.

CHAP. IV.

Concerning general commissions of oyer and terminer.

JUSTICES of *oyer and terminer* are of two kinds, *viz. Justiciarii ordinarii*, such is the court of king's bench, the supreme ordinary court of *oyer and terminer*, and is comprised within the statutes, that give power to justices of *oyer and terminer*, as hath been already said.

The delegate or commissionate justices of *oyer and terminer* are those, who are by commission, which usually is granted in the circuits directed to justices of assise and divers others, or any three of them, whereof commonly one of the justices of assise is of the *quorum*; and it is *ad inquirendum per sacramentum proborum & legalium hominum* [23] of the several counties *de quibuscunque proditionibus, &c.* and divers other offenses therein mentiond, *ac de omnibus injuriis &*

(f) 1 And. 107.

(*) This case was M. 31 Eliz.

malefactis quibuscunque in comitatibus Bucks, &c. eaque omnia audiendum & terminandum, facturi inde quod ad justitiam pertinet secundum legem & consuetudinem regni Angliæ, &c. and this to be done *tam infra libertates quam extra.*

This commission is specially called a commission of *oyer and terminer*; and therefore, altho' justices of peace have a clause in their commission *ad audiendum & terminandum felonies, &c.* yet justices of peace come not under the name of justices of *oyer and terminer* within those acts of parliament, that mention justices of *oyer and terminer*; as upon the statute of 5 *Eliz. cap. 14.* for forgery, as shall be said farther hereafter in the chapter of justices of peace. 9 *Co. Rep.* 118. *b.* lord *Sanchar's* case, *Co. P. C. cap. 41. p. 103.*

But the justices of the court of king's bench are the sovereign ordinary commissioners of *oyer and terminer*, as hath been before said.

My lord *Coke* in his 4 *Instit. cap. 28 & 30.* hath laid together the learning of the courts of *oyer and terminer* and gaol-delivery, whose method I shall follow

Commissioners of *oyer and terminer* before their sessions, issue a precept to the sheriff much of the same form as commissioners of gaol-delivery do; see the form thereof, *Rast. Entries* 443. *b.* title *oyer and terminer. 1 E. 3.*

1. The justices of *oyer and terminer* in criminal causes cannot be by writ, but must be by commission under the great seal; otherwise their proceedings are void. 42 *Affiz.* 12.

2. Both in commissions of *oyer and terminer* and of gaol-delivery, and other commissions of like nature directed to one or more, there may be additional commissions of association, and thereupon writs are to issue to the former commissioners *de admittendo in societatem*; and if all cannot attend the session, a writ of *Si omnes interesse non possitis, tunc vos tres vel duo vestrum, quos presentes esse contigerit, (quorum aliquem vestrum, A. B. vel C. D. unum esse volumus,) ad præmissa faciend' intendatis. &c.* Vide *F. N. B. p. 111, 112.*

[24] 3. Justices of *oyer and terminer* or gaol-delivery, if they once sit without adjournment, their commission is determined; but tho' they be appointed only *pro hac vice*, yet they may continue their sessions from day to day by adjournment; the like for all other commissions.

But it is not always necessary nor usual to enter their adjournment on record, (tho' it might be fit in many cases,) and then if it be not entered

entered on record, their session always relates to the first day, and so are their records entered as of the first day of the session.

But in some cases it is absolutely necessary to enter their adjournments on record, as where an indictment is taken the first day of the session before justices of *oyer* and *terminer*, and they make a precept to the sheriff to return a jury the next day, or at any following day, upon the prisoner's plea of not guilty, there must be a record made of the adjournment of the sessions to that day, otherwise it will be erroneous, (because without such entry the whole sessions will be supposed in law to be held the first day,) and out of the sessions; the like for justices of peace.

So if after the first day of the sessions either of *oyer* and *terminer*, or gaol-delivery, there be a felony committed, and the party indicted for it, there must be an entry of the adjournment, at least till the day of the indictment taken, because otherwise the felony will be supposed in law to be committed after the determination of the sessions. 14 Car. 1. *Sampson's case* (a).

4. Commissions of *oyer* and *terminer*, gaol-delivery, and regularly all other commissions are determined by one of these four ways. 1. By a session and non-adjournment, as before. 2. By the king's death: yet it is held, tho in strictness of law the commissions be determined by the king's death, so as no proclamation without an act of parliament can give them continuance, but they must have new commissions, *Croke*, 1 Car. 1. p. 1. yet the acts they do by virtue of these commissions after the king's death, and before notice thereof, stand good. *M.* 3 Car. C. B. *Croke*, p. 97, 98. in *Sir Randolph Crew's case* (*). 3. By express *Supersedeas* by a writ; but this *Supersedeas* by writ, tho it be a *Supersedeas omnino*, yet [25]

(a) *W. Jones*, 420.

(*) But now by 7 & 8 W. cap. 27. and 1 Ann. cap. 8. it is enacted, " That no
" commission either civil or military,
" That no patent or grant of any office or
" employment either civil or military,
" That no commission of assize, *oyer* and
" *terminer*, general gaol delivery, or of
" association, writ of admittance, writ of
" *fi non omnes*, writ of assistance, or com-
" mission of the peace shall be determind
" by the demise of any king or queen of
" this realm, but shall continue in full
" force for six months next ensuing not-
" withstanding such demise, unless super-
" seded and determind by the next suc-
" cessor: And also no original writ, writ

" of *Nisi prius*, commission, process, or
" proceedings whatsoever in, or issuing
" out of any court of equity, nor any
" process or proceeding upon any office
" or inquisition, nor any writ of *Certio ari*,
" or *Habeas Corpus* in any matter or cause
" either criminal or civil, nor any writ
" of attachment, or process for contempt,
" nor any commission of delegacy, or re-
" view for any matters ecclesiastical, tes-
" timentary, or maritime, or any process
" thereupon shall be determind, abated or
" discontinued by the demise of any king
" or queen of this realm, but shall remain
" in full force, as if such king or queen
" had lived.

is not an absolute repeal of the commission, but only a suspension, for it may be renewed again by a writ of *Procedendo*, 12 *Affiz.* 21. adjudged. 4. By the issuing a new commission of the same nature in the same county, and notice thereof.

And therefore before the former commission be determin'd, there must be notice, which is, of three kinds. 1. By shewing the new commission; this determines the former, as to all those and those only to whom it is shewn. 2. By a proclamation of the latter commission in the county; this determines the former commission wholly. 3. By a session in the county by force of the latter commission in the county. *Coke, 4 Instit. cap. 28. p. 165.*

If a general commission of *oyer and terminer*, gaol delivery, or the peace, issue for the county at large; and afterwards a special commission of the like nature for one town, or for the *loca maritima* of that county, this new commission, with notice as before, doth determine the general commission *pro tanto*. 25 *Eliz. Lacie's case*, 1 *Leon. n.* 363. *p. 270. & supra, cap. præcedente.*

And so *è converso*, if a special commission of *oyer and terminer*, gaol-delivery, or the peace, issue for a particular town or city, not being a county, or for the *loca maritima*, a general commission of like nature in the county, with such a notice as before, de-
 [26] termines the special commission: But by the statute of 2 & 3 *P. & M. cap. 18.* this is helped as to special commissions in cities and towns corporate, as hath been before said; but *that* statute is to be intended only of towns or cities, as it seems, (*quære*) and extends not to commissions of *oyer and terminer*. 4 *Co. Instit. p. 165. in margine.*

But if there be a general commission of *oyer and terminer*, or gaol-delivery, or peace for the whole county, and a special commission of the same nature to a liberty, hundred, or other precinct, as in a hundred, liberty, or franchise within the county, and both bear *teste* the same day, they all stand. Thus it is in *Suffolk*, where there have been always three commissions of gaol-delivery to the justices of assize, one for the county at large, another for the franchise, another for the town of *Bury*, and they impanel several grand juries, and sit and act respectively by each commission.

And the justices of gaol-delivery in the franchise must sit in the franchise by the statute of 27 *H. 8. cap. 24.* and the reason is, because antiently the abbots of *St. Edmund's-Bury* did by virtue of the king's letters patent,

patent, constitute their own justices of gaol-delivery in the franchise and town; and therefore the sessions of gaol-delivery is fittest to be held at *Bury*; but the commission of *oyer* and *terminer* extends *tam infra libertates, quàm extra*; but of this *vide cap. prox.*

But a commission of one nature doth not supersede a commission of another nature, as a commission of *oyer* and *terminer* is not repealed by a subsequent commission of gaol-delivery or the peace, nor *è converso*, for they are of several natures. 3 *Mar. B. Commission* 24.

These things before-mentiond are common to all judiciary commissions; these that follow, more particularly concern general commissions of *oyer* and *terminer*.

1. Regularly upon the commission of *oyer* and *terminer* there should issue a precept to the sheriff in the name of three commissioners at least, whereof one of the *quorum*, and under their particular seals, bearing date fifteen days at least before their session, to the sheriff to return twenty-four for a grand inquest *ad inquirendum, &c.* [27] at such a day; and the sheriff is to return his pannel annexed to the precept.

2. Regularly the commissioners of *oyer* and *terminer* cannot proceed upon any indictment taken before others than themselves. 3 *Mar. B. Commission* 24. And therefore they cannot proceed upon the coroner's inquest, or upon an indictment of felony before justices of peace.

But this rule hath two exceptions. 1. That it is only intended of a general commission of *oyer* and *terminer*, for, as hath been shewn, there may be a special commission to determine a treason or felony taken before other commissioners of *oyer* and *terminer*, *Plowd. Com. p. 390. Casus com' Leicest.*; nay, or by the coroner or justices of the peace. 2. That it doth not extend to an inquisition taken before other commissioners of *oyer* and *terminer*; for it is and always hath been the constant practice to take indictments before commissioners of *oyer* and *terminer*, as for highways, barretry, forgery, perjury, &c. and to try them before other commissioners of *oyer* and *terminer* at another subsequent sessions; and if there were any doubt of that at common law, yet the statute of 1 *E. 6. cap. 7.* hath settled it, *viz.* “ That no process or suit made before the justices of assise, gaol-
“ delivery, *oyer* and *terminer*, justices of peace, or any the king's
“ commissioners, shall be in any wise discontinued by making or
“ publishing any new commission or association, or by altering the

“ names of the justices ; but the new justices of assise, gaol-delivery
 “ and the peace, or other commissioners may proceed in every be-
 “ half, as if the old commissions, justices and commissioners had still
 “ remaind and continued not alterd.

And this gives power to the justices of *oyer* and *terminer*, &c. to proceed upon indictments taken by former justices of *oyer* and *terminer*, as well in cases of treason or felony, as other misdemeanors.

3. In case where a felon or traitor, &c. pleads to an indictment taken before justices of *oyer* and *terminer*, they ought not, (as in case of justices of gaol-delivery,) to award a precept *ore tenus* to the sheriff to return a jury, but it must be by precept in the names
 [28] and under the seals of the commissioners, or three of them, whereof one of the *quorum*. 4 *Co. Instit. cap.* 30. *p.* 168. & *ibidem cap.* 28. *p.* 164. and the sheriff ought to return the pannel filed to the precept.

4. But the indictment may be preferred, issue joined, precept made and returned, and prisoner tried the same day before commissioners of *oyer* and *terminer*: see the precedents cited 4 *Co. Instit. cap.* 28. *p.* 164. *P.* 16 *Car.* 1. *B. R. Croke* 583. resolved *per omnes Justiciarios Angliæ*, altho there were no commission of gaol-delivery in that case, but only of *oyer* and *terminer*. *Accords H.* 9 *Car.* *B. R. Chapman's* case for barretry before justices of *oyer* and *terminer*. 2 *Roll. Abr.* *p.* 96. And the same law is questionless for justices of gaol-delivery. *T.* 9 *Car.* *B. R. Croke* 315.

But in cases of justices of the peace it hath been held, that they cannot try the same session that the party pleads to the indictment, much less the same he is indicted. 22 *E.* 4. *Coron.* 44. *H.* 11 *Car.* 1. *B. R. Croke*, *p.* 438 & 448. adjudged in cases not capital, *Bumpsted's* case in an indictment of extortion, and accordingly ruled *T.* 23 *Car.* *B. R. Pue's* case for seditious words. 2 *H.* 8. *Kelw.* 259.

But yet it hath been held good even before justices of peace to receive an indictment, and put the party, if present, to plead to it, and try it the same sessions, *T.* 14. *fac.* *B. R. Cro.* 404. *Rice's* case adjudged good, 4 *Co. Instit. cap.* 28. *p.* 164. *without question they may*: And there can be no difference assigned between sessions of the peace and *oyer* and *terminer* in this case, nor between causes criminal and capital, for the offenses rise in the same county, and as there goes out a summons of gaol-delivery, so there issues a general summons

mons of the sessions of the peace; and that all constables, &c. then attend; *quod vide Crompt. de pace, f. 232. a. 2 Co. Instit. super Articulis, cap. 15. p. 568.*

Yet in respect of this contrariety of opinion, the use hath commonly obtained, that in cases not capital both before justices of *oyer and terminer*, and of the peace, he that traverseth an indictment, hath time to try it till the next session; but where the party is in prison, the justices of gaol-delivery put him to answer, and [29] try it presently.

But in all treasons and felonies, as well before justices of *oyer and terminer* or of peace, as well as before justices of gaol-delivery, the constant course is to indict the party, put him to plead, try him, and give judgment, and all at the same sessions; and it is fit to hold the course according to the modern usage; but it seems to me, that in all cases criminal or capital, justices of *oyer and terminer* may *de rigore juris* proceed to indictment, trial and judgment the same sessions.

5. The court of the general commissioners of *oyer and terminer*, as likewise that of the gaol-delivery and of assise, comes under the name of a court of record in relation to those offices, that by act of parliament are directed to be punished in any court of record; as the statute of 5 & 6 E. 6. cap. 14. of forestallers, &c. and the statute of 33 H. 8. cap. 9. of unlawful games, by the opinion of my lord Coke, 4 Instit. cap. 28. p. 164. and according to him, if it be limited to be punished in any of *his majesty's* courts of record.

But there is a great authority against this, and that in such cases, especially the latter, it only extends to the four great courts at *Westminster*. as upon the statute of drapery, 4 & 5 P. & M. cap. 5. which is, that the penalties of that act shall be recovered by action, bill, plaint or information, or otherwise *in any court of record*, wherein no essoin, protection, wager of law, or injunction shall be allowed; this extends only to the four courts of *Westminster*, Gregory's case, 6 Co. Rep. f. 19. b. of tillage, labourers, &c. (e) *to be recovered in any of the queen's courts of record*, by the opinion of all the judges except Catlin, Sanders and Whiddon, extends only to the four courts of *Westminster*, and not to commissioners of *oyer and terminer*; but otherwise it is, if no court be appointed. M. 6 & 7 Eliz. Dy. 236. a.

(a) 5 Eliz. cap. 4.

Again, by the statute of 23 *H. 8. cap. 4.* against brewers for selling
 [30] beer by less measure than is appointed by the act, the penalty
 half to the king half to the informer, to be recovered by action
 of debt, bill, plaint, or information *in any of the king's courts*, wherein
 no wager of law, essoin, protection or privilege shall be allowed, *T.*
4 Car. C. B. Croke, p. 112. Farrington's case: Ruled, that not-
 withstanding the statute of 21 *Jac. cap. 4.* this information lies in
 the common bench, because the justices of *Nisi prius, oyer and ter-*
miner, or of the peace, or gaol-delivery cannot hold plea upon this
 statute, because these justices cannot allow an essoin or protection;
 and the statute of 23 *H. 8.* extends only to such courts as can allow
 a protection, &c. and accordingly I have known it resolved upon the
 statute of 7 *E. 6. cap. 5.* for wines; and about 23 *Car. 2.* it was re-
 solved upon a writ of error in the exchequer-chamber, upon a judg-
 ment given in the exchequer for *Foly* a defendant in an information
 upon the statute of 1 *Eliz. cap. 15.* (whereby the cutting of timber
 within fourteen miles of a navigable river is prohibited on pain of
 forfeiting of forty shillings for every tree, a moiety to the queen, and
 a moiety to the informer, to be recovered by original writ, bill, plaint
 or information, wherein no essoin, protection, wager of law, or in-
 junction shall be allowed,) that this extends not to the commissioners
 of *oyer and terminer*, nor other courts in the country, but only to the
 four courts at *Westminster*. 1. Because original writs are not re-
 turnable before them. 2. They cannot allow or disallow protections
 or essoins; whereupon the judgment for costs was affirmed; and yet
 here is no mention of *any court, or court of record, or his majesty's*
courts, but purely upon these two reasons.

And yet I believe hundreds of informations have been before justices
 of *oyer and terminer* and *assise*, yea and of the peace in the country
 upon several acts, that have the like clauses, as 35 *H. 8. cap. 7.* for
 the preservation of woods, and infinite others according to my lord
Coke's opinion, but when it hath come to be judicially debated, I have
 not known it to obtain; but the resolution in *Farrington's* case and
 in *Gregory's* case have still been allowed.

[31] 6. Commissioners of *oyer and terminer* cannot assign a
 coroner to an approver, nor justices of peace, but justices of
 gaol delivery may. 4 *Co. Instit. p. 165. Stamf. P. C. p. 143. b.*

7. By the statute of 5 *E. 3. cap. 11.* justices of *oyer and terminer*
 may issue process of outlawry in any county of *England* against
 persons

persons indicted before them, and also a *capias utlegatum* against persons outlawed.

8. By the statute of 9 E. 3. *cap.* 5. justices of *oyer* and *terminer*, gaol-delivery, and assise are to send their records and processes determined and put in execution to the exchequer at *Michaelmas* once every year under their seal, to be kept by the treasurer and chamberlains, but are to take out their estretes first.

9. All the precepts and processes of justices of *oyer* and *terminer* regularly are to be in the names and under the seals of the justices (*viz.* three of them, one of the *quorum*); and altho at this day there is no other warrant for the execution of prisoners condemned, but a calendar left with the sheriff under the hand of the justice that sits, yet antiently there was a warrant under their hands and seals, and in the names of the commissioners. *Co. P. C. p.* 31.

But if the prisoner be in custody of the sheriff, the truth is, there is no need of any warrant or calendar, for the open pronouncing and entering of the judgment *Suspendatur* is a warrant for the execution, and so it is in the king's bench, the entry on record of the judgment with a *præceptum est marescallo quod faciat executionem periculo incumbente*, without any formal writ or precept of the court is sufficient, and more is not usual: and the calendar subscribed by the judge of gaol-delivery is but a memorial; and *Rolle* would never sign any calendar, but gave his orders openly in court with a charge to the sheriff and gaoler to take notice of them.

More may occur touching these matters in the next chapter.

See Index to 2 Hawk. P. C. tit. Oyer and Terminer.

CHAP. V.

[32]

Touching justices of gaol-delivery.

THIS court is by commission under the great seal directed commonly to five or any two of them, *quorum aliquem vestrum A. B. vel C. D. unum esse volumus ad gaolam nostram comitatûs nostri S. de prisonibus in eâ existentibus deliberandis*; see the whole tenor of the commission. 4 *Co. Instit. cap.* 30. *p.* 168.

1. By

1. By the statute 8 R. 2. cap. 2. no man of law shall be justice of assise or common deliverance of the gaol in his own country; this statute is expounded by 33 H. 8. cap. 24. to be meant of the county, where he dwelleth; and as to justices of assise a penalty of one hundred pounds is added, if he exercises that office in the county where he is born or doth inhabit; but both these acts are usually dispensed with by a special *non obstante*.

By a special privilege by charter granted to the city of London the lord mayor is of the *quorum*, 2. R. 3. 11. a. and so it is in the city of Norwich.

2. Justices of gaol-delivery may proceed against prisoners (if in gaol) upon inquisition before the coroner or any other justices; and therefore justices of peace must send in their indictments not determined unto the justices of gaol-delivery to be proceeded upon, whether they be felonies or trespasses, if the party be in gaol or set to bail. Stat. 4 E. 3. cap. 2.

3. The justices of gaol-delivery after their commission sealed do, or should issue a precept to the sheriff importing these things, viz.

1. That upon such a day and place, *Venire facias omnes prisiones in prisonâ domini regis com' prædict' existentes vel per ipsum per manucaptionem dimiss. cum eorum attachiamentis & omnibus aliis eorum deliberationem tangent' & penes se remanent'*. 2. *Quòd Venire facias at the day and place 24 legales homines de quolibet hundredo & inquirendum pro domino rege & corpore comitatûs prædicti.* [33] 3. *Ac alios 24 probos & legales homines de comitatu prædicto ad faciendam juratam inter dominum regem & prisiones prædictos.* 4. *Et proclamari facias dictam deliberationem gaolæ in omnibus civitatibus, burgis & aliis locis, quòd omnes, qui sequi voluerint versus prisiones prædictos pro domino rege vel se ipsis, adtunc sint ibi in formâ juris prosecuturi.* 5. *Scire facias etiam omnibus Justiciariis ad pacem comitatûs prædicti, coronatoribus, capitalibus constabulariis pacis, majoribus, ballivis, senescallis magnatûm, ballivis hundredorum & libertatûm, quòd tunc sint ibi ad faciendum quod ad officium suum pertinet, & tu adtunc sis ibi unâ cum ballivis & ministris suis ad faciendum ea, quæ tuo & eorum officio incumbunt.* 6. *Et habeas ibi tam nomina Justiciariorum ad pacem, coronatorum, capitalium constabulariorum pacis, senescallorum magnatûm, ballivorum hundredorum & libertatûm, quàm juratorum prædictorum, & hoc præceptum.*

This

This precept is made in the king's name, or in the name of the justices of gaol-delivery, *Vide formam inde Rast. Entries, p. 385. a.* Gaol-delivery 1. *Venire facias de quolibet hundredo 24 tām milites, quām alios (*) & de qualibet villatā, ubi dicti prisiones indictati existunt, quatuor homines & præpositum ad faciendum ea, quæ ex parte domini regis tunc ibidem injungentur.*

This is not unlike the summons of the *Iters* formerly, nor altogether unlike the summons of the sessions of the peace, *quod vide Crompton de Pace, p. 232. a.* which is in the king's name, and so may this, with the *Teste* of the chief justice: Or it seems it may be in the name of the justices of gaol-delivery and under their seal; *vide simile in Helcroft's case, Co. Entries 55.* by the justices of gaol-delivery for the verge; this precept is accordingly returned, the justices of peace, coroners, mayors, bailiffs of hundreds, and liberties, constables of hundreds, and names of the grand inquest returned and called in order.

4. And therefore it hath never been a question, but that the justices of gaol-delivery may take an indictment, try, [34] and give judgement the same day. 22 E. 4. Coron. 44.

5. But altho this solemnity of summons of the gaol-delivery may be, and should be used, yet they may command the sheriff *ore tenus*, to return a pannel without any precept in writing to him, (as is necessary in case of justices of *oyer* and *terminer*,) and the reason is given, because there is a general command to the sheriff by the summons of the gaol-delivery to return twenty-four to try prisoners. 4 H. 5. Enquest 55. 4 Co. Instit. cap. 30. p. 168.

6. They may deliver by proclamation persons imprisoned, where either no indictment is preferred, or an indictment preferred and *ignoramus* found, which is said cannot be done by justices of *oyer* and *terminer*, or of the peace. 2 R. 3. Corone 47.

7. They may originally take indictments of felony of such prisoners as are in gaol; this hath been accordingly resolved and is the constant practice, and so may justices of *oyer* and *terminer*: So that when the prisoner is in gaol, both have a concurrent jurisdiction. 4 Co. Instit. cap. 30. p. 168 & 169. and accordingly it was resolved in the case of *Apharry* and *Morgan*, P. 29 Eliz. there cited. And therefore the case of 3 Mar. B. Commission 24. and Pasch. 32 Eliz.

(*) The words in *Rastal* are *libros & legales homines*.

B. R. Purfell's case, Croke, n. 10 p. 179. wherein it is said, that justices of gaol-delivery cannot take an indictment, unless they be also justices of peace, and then they may take an indictment as justices of peace, and try him as justices of gaol-delivery, is to be intended, where the offender is at large and out of prison, for if he be in prison, the indictment against him may be taken before them as justices of gaol-delivery, or as justices of *oyer and terminer*, or of the peace.

8. And therefore justices of *oyer and terminer*, gaol-delivery, and of the peace may make up their record by all three of the powers; and if it be good by one commission or by the other, it is good and not erroneous, and the best shall be taken for the king. 9 *H. 7. 9. a. 3. Mar. B. Commission 24. Crompt. Jurisdiction de Courts 226.*

[35] 9. If a person be let to bail, yet he is in law, in prison, and his bail are his keepers, and therefore the justices of gaol-delivery may take an indictment against him, as well as if he were actually in gaol; but he that is let to mainprise is not in custody, 21 *H. 7. 33. a. 9 E. 4. 2. a. 39 H. 6. 27. b.* in the one case the entry is *traditur in ballium.* in the other *deliberatur per manucaptionem.*

10. They may take an indictment against persons for high treason, if they be in gaol, and may try and give judgment upon them, as well as commissioners of *oyer and terminer* against the opinion delivered *H. 15 Jac. B. R. Bumpsted's case.*

This appears by the statute of 1 *E. 6. cap. 7. vide 4 Co. Instit. p. 169. & libros ibi*, and it is constant experience.

11. By the statute of 1 *E. 6. cap. 7.* the subsequent commissioners of gaol-delivery have power to give judgment upon a person reprieved after conviction, and altho it be made a *quære*, *Dy. 205. a.* whether they may as well award execution upon a judgment given by the former commissioners of gaol-delivery, &c. yet it seems to be without question they may. 1. Upon the very common law, if a person be indicted and outlawed for felony before justices of peace, yet if he be in prison the justices of gaol-delivery have power to award execution upon that outlawry, for they are constituted *ad gaolam deliberandam* 15 *H. 7. 5. b.* agreed, and certainly if there had been any doubt of that, the statute of 1 *E. 6.* would have made as special a provision for awarding execution upon a judgment given by former commissioners, as for giving judgment upon a conviction before them. 2. But if there were any doubt thereof at common law, yet the statute of 1 *E. 6. cap. 7.* hath sufficiently enabled them thereunto by the last clause thereof,

thereof, *viz.* that notwithstanding the altering of the commissions of assise, *oyer* and *terminer*, gaol-delivery, or the peace *the new justices may proceed in every behalf, as if the old commissions or commissioners had continued not altered.*

12. They may receive appeals by bill against any person being in gaol.

13. They may assign a coroner to an approver, and make out process against the appellee in a foreign county by the [36] statute of 28 E. 1.

14. The sheriff is to deliver unto the justices of gaol-delivery the names of all persons in gaol, or that are bailed or let to mainprise by him for felony by the statute of 3 H. 7. cap. 3.

15. If a statute limit specially an offense to be heard and determined by the justices of peace, as that of 3 H. 8. cap. 5. it is doubtful whether justices of gaol-delivery, yea of *oyer* and *terminer* may hear and determine it; but upon the statute of 7 H. 7. cap. 1. which speaks only of justices in the county, either the commissioners of *oyer* and *terminer* or gaol-delivery may hear and determine it.

16. By the statute of 3 H. 8. cap. 12. The justices of gaol-delivery or of the peace, have power in open session to reform all pannels returned before them, by putting out and putting in names of persons, which pannels so reformed, shall be accordingly returned by the sheriff: And *note*, this command is *ore tenus*.

And hence it comes to pass, that altho upon trials of felons in the king's bench, or *oyer* and *terminer*, if the prisoner challenge twenty peremptorily, as he may, so that there be not sufficient remaining of the pannel, there is to be a *Tales* granted by precept returnable as the case requires; yet before justices of gaol-delivery the prisoner gets no time by it, for the sheriff by the command of the court *ore tenus*, may enlarge the pannel without any formal precept: *Vide Stamf. P. C. Lib. III. cap. 5. fol. 155. b.* and therefore *Tales* are not granted by precept before justices of gaol-delivery, which much expedites all business before them.

17. By the statute of 9 E. 3. cap. 5. The records before them determined are to be delivered to the treasurer and chamberlains of the *Exchequer* at *Michaelmas* yearly.

18. By the statute of 34 H. 8. cap. 14. The clerks of the crown, clerks of assise, and clerks of the peace are to certify into the king's bench

bench the names of all persons outlawed, attainted, or convicted, and
 [37] upon letter from the justices aforesaid certificates shall be made
 of such persons outlawed, attaind, or convict, to the justices
 of gaol-delivery.

19. Justices of gaol-delivery may send prisoners by *Habeas Corpus* to the sheriff of another county, and a precept to the sheriff of that other county to receive them, namely, for a felony committed in that county, tho that county be out of the circuit of the justice that sends them; and tho I once knew it scrupled, yet I think the law is clear in it; *vide* 1 & 2 P. & M. cap 13. *in fine*; for of necessity the justices of gaol-delivery have in some cases power out of the precincts of their county or circuit; as where an approver appeals a person in a foreign county, and this is certified, as it ought, to the justices of gaol-delivery, where the approver is, the justices of gaol-delivery, may make out process of *capias*, and it seems also of *exigent* against the appellee, and yet he is neither in gaol nor in the same county. 29 E. 3. 42. a. *Corone* 462.

But upon an inquisition before the coroner returnd before justices of gaol-delivery they cannot make process of outlawry: *vide petitionem inde in parlamento*, 29 E. 3. n. 22. *sed non obtinuit*; but the answer was only, *Soit l' auncient ley sur ceo use*.

20. *A.* and *B.* are indicted before the justices of peace of *Middlesex*, and according to the statute of 4 E. 3. cap. 1. the indictment is deliverd over to the justices of the gaol-delivery of *Newgate*: *A.* appears and is tried and acquitted, *B.* appears not. 1. The justices of peace cannot make out process against *B.* because the record is not before them. 2. The justices of gaol-delivery cannot make out process returnable before the justices of the peace, because another court. 3. By some opinions the justices of gaol-delivery may make out process to the outlawry returnable at the next sessions of gaol-delivery; but others thought they had no such power, for their commission is to deliver the gaol, and not to issue process against them that are out of gaol, neither can they proceed to the outlawry before themselves, as commissioners of *oyer* and *terminer*, because the indictment was taken before other justices, *viz.* of the peace: It was therefore held the
 [38] entire record must be removed into the king's bench by *certiorari*, and from thence process of outlawry may go against *B.* T. 11. *Car. B. R.* 2 *Rol. Abr.* 96. *Storie's* case, who in this case
 was

was outlawed before the justices of peace, and the outlawry therefore reversed.

21. By the statute of 26 *H. 8. cap. 6.* The justices of peace and gaol delivery in the counties adjacent to *Wales* have power to hear and determine counterfeiting, washing, or clipping of coin, murder, burnings of houses, manslaughter, robbery, burglary, rapes, and other felonies, and the accessaries thereof committed in *Wales*, or any lordship marcher, &c. as if committed in the same adjacent county: This is repeald as to treasons by the statute of 1 & 2 *P. & M. cap. 10.* but stands in force as to other felonies.

22. By the statute of 27 *H. 8. cap. 24.* The power of making justices of *eyre*, of assise, gaol-delivery, and of the peace in counties palatine and franchises is resumed, and the same are to be made by letters patents under the great seal of *England*.

But they shall hold their sessions only within such franchises and liberties, and in none other places, as the justices of the said liberties lately have commonly used within the said liberties; and that no person within the said liberties be compellible by authority of this act to appear out of the same before other justices of assise, gaol-delivery, or of the peace, than those named by the king to sit within the said liberties.

By this statute, 1. These justices sitting within exempt franchises or counties palatine are now the king's courts and the king's justices, and therefore a *certiorari* issuing out of the king's bench to these justices sitting in *Durham* or the *cinque-ports* ought to be obeyed as by other justices out of franchises. 2. That yet where franchises of this nature were antiently granted to abbots to make justices of gaol-delivery to sit within franchises, as for instance in the franchise of *St. Edmunds-Bury*, there is a special commission of gaol-delivery for that franchise. 3. That this restriction of sitting within the franchise extends not to the commission of *oyer* and *terminer*, for that extends *tam infra libertates, quàm extra*, and therefore may sit out of a franchise, [39] and determine misdemeanors within the franchise: And this

I did once in a session in the county of *Suffolk*, which by reason of sickness at that time, could not be held in *Bury*, *viz.* I kept the session for the whole county by virtue of the commission of *oyer* and *terminer*.

4. This resumption extends not to cities and boroughs, but they are specially excepted, and particular provision for the bishops of *Ely*,

Durham and *York*, to be justices of the peace only within their franchise.

23. By the statute of 6 *R. 2. cap. 5.* they are to hold their sessions in the principal towns, where the county-court is held; but this is but directive not coercive, for the judges may, and usually have appointed their sessions at their pleasure in other places.

4. Blackf. Com. ch. 19. p. 269. 270. See Index to 2 Hawk. Tit. Gaol-delivery.

C H A P. VI.

Touching the power of justices of assise and nisi prius, with relation to felony.

THE settled course of granting *nisi prius* was by the statute of 27 *E. 1. de finibus, cap. 3.*

By the construction made of that statute, if a man be indicted in the country, and that indictment removed by *certiorari*, and the body of the prisoner by *habeas corpus* into the king's bench, and there he pleads *not guilty*, after that statute and before the statute of 6 *H. 8. cap. 6.* the transcript of the record might be sent down by *nisi prius* to try that issue. 22 *E. 4. 19. 5 Mar. B. Coron. 231.* Statute 42 *E. 3. cap. 11. 4 Co. Rep. 43. b. Bibith's case.*

And the like may be done in an appeal, 21 *H. 7. 34. a. 2 & 3 P. & M. Read's case, Dy. 120. a. Rast. Entries in title Appeal per totum, 8 H. 5. 6. Coron. 463.*

[40] Upon the statute of 27 *E. 1. cap. 3.* and the statute of 14 *H. 6. cap. 1.* there hath been variety of opinions touching their power in cases of felony: Some have thought, that by virtue of those statutes they had originally a power to hear and determine felonies without any other commission, tho as to treason concerning coin, upon the statute of 3 *H. 5. cap. 7.* it is expressly directed, that they shall have a commission for the hearing and determining that offense; thus *Stamf. Lib. II cap. 5. f. 57 & 58.* Again, others have thought, that they have not any such original power without a special commission enabling them to hear and determine felonies originally; but that commission, as it seems by the statute of 27 *E. 1. cap. 3.* is called *a writ*, but is in truth no other than a commission, for all associations are commissions; and then the naming of them justices of
nisi

nisi prius is nothing else but the description of those persons, to whom commissions of gaol-delivery shall be directed, and so they are no other but justices of gaol-delivery.

Others have thought, and that truly, that the justices of *nisi prius* have not any original power of hearing and determining indictments of felony without a special commission for that purpose, but that by virtue of the acts of 27 E. 1. and 14 H. 6. they have a power to determine such felonies only, as are sent down to trial before them; as they have power by the statute of *Westm. 2. (a)* to give judgment in assises of *darrein presentment* and *quare impedit*, where an issue is brought down to trial before them, tho they have no power originally to hold plea in a *quare impedit*.

And that this was the meaning of the statute of 14 H. 6. *cap. 1.* and tho it speaks of all cases of felony and of treason, yet it is intended only of such felonies or treasons as were at issue and brought down before them to be tried by *nisi prius*, appears in this, that as to those points of treason, which were enacted by 3 H. 5. *cap. 7.* it is expressly enacted by that statute, that they shall have commissions to hear and determine them, and so as to those they needed not the aid of a new statute to enable it.

Now as to the usage thereupon.

1. In case of appeals. If issue be joined and sent down by *nisi prius* to be tried, antiently indeed they did not proceed to judgment; but if the defendant, were acquitted, they did by the same jury inquire, 1. Of the damages. 2. Of the sufficiency of the plaintiff. 3. Of the abettors; and this inquest being returned into the king's bench, there judgment and execution were made, *quod vide* 8 H. 5. 6. *Coron.* 463. yea and by *Fairfax*, 22 E. 4. 19. If the plaintiff were nonsuit at the *nisi prius*, the justices of *nisi prius* should only record it, and remit the record into the king's bench, and not arraign the prisoner at the king's suit.

But the later practice and authority is otherwise, *viz.* That they may not only inquire of the abettors, but also give judgment against them; and, if the plaintiff be nonsuit, may arraign the prisoner at the king's suit, and give judgment and make execution. *Dy.* 120. *a.* *Read's case.* And so if he be convicted of manslaughter upon an appeal. the justices of *nisi prius* allow his clergy, 4 *Co. Rep.* 43. *b.* *Bi-*

(a) *cap. 30.* See 2 *Co. Instit.* 424.

bith's case; and this it seems is warranted by the construction of the statute of 14 *H. 6. cap. 1.* for the statute of *Westm. 2. cap. 12.* (*b*) extends not to this case, especially of arraigning the prisoner upon a nonsuit.

2. As to an indictment of felony or treason removed out of the county by *certiorari*, and the party pleading, the record is sent down by *nisi prius* to be tried, the judges of *nisi prius* may upon that record proceed to trial, and judgment, and execution, as if they were justices of gaol-delivery by virtue of the statute of 14 *H. 6. cap. 1.*

But if there were any question upon that statute, yet the statute of 6 *H. 8. cap. 6.* which extends to all justices and commissioners as well as those of gaol-delivery and of the peace, enables the court of king's bench to send to them the very record itself, and by special writ or mandate to command them to proceed to trial and judgment upon such issue joined; as they may command the justices, before whom the indictment was taken, to proceed to hear and determine the same if no such issue were joined.

4 Blacks. Com. ch. 19. p. 269. See Index to 2 Hawk. P. C. Titles Affise. Nisi prius.

(*b*) 2 Co. Instit. 383.

Concerning the commission of peace, and the power thereof, in relation to felonies.

AT common law there were conservators of the peace assigned by the king by commission.

But the first establishment of justices of the peace was by the statute of 1 *E. 3. cap. 16.* *Good and lawful men shall be assigned in every county to keep the peace.*

And by the statute of 18 *E. 3. cap. 2.* *Two or three of the best reputation in the counties, with other wise and learned in the law, shall be assigned by the king's commission to hear and determine felonies and trespasses done against the peace in the same counties, and inflict punishment reasonably according to law and reason, and the manner of the deed; and this statute directed their power of hearing and determining as well as keeping the peace,*

In pursuance of these statutes, and of other statutes (a) relative to justices of peace, they have a commission of the peace under the great seal directed to them.

And this commission consisted antiently of three clauses of *Assignavimus*, and now of two.

The first is, *Assignavimus vos conjunctim & divisim & quemlibet vestrum ad pacem nostram in com' Cant' conservandam, &c.* And this makes every of them conservators and justices of the peace for those acts that are performable by one justice.

The second is, *Assignavimus vos & quoslibet duos vel plures vestrum, quorum aliquem vestrum A. B. C. &c. unum esse volumus, justiciarios nostros ad inquirendum per sacramentum proborum & legalium hominum de comitatu prædicto, per quos rei veritas melius sciri poterit, de omnibus & omnimodis feloniiis, veneficiis, incantati-* [43] *onibus, arte magicâ, sortilegiis, transgressionibus, forestallariis, regratoriis, ingrossariis, extortionibus quibuscunque: Ac de omnibus & singulis aliis malefactis & offensis, de quibus justiciarii pacis nostræ legitimè inquirere possunt aut debent, per quoscunque & qualitercunque in comitatu prædicto factis & perpetratis, vel quæ in posterum ibidem fieri contigerit; and then goes to some particular offenses, and to inspect indictments taken before them or before former justices of the peace, and to make process against persons indicted, quousque capiantur, reddant se, vel utlagentur: Ac omnia & singula felonias &c. & cætera præmissa secundum legem & consuetudinem regni nostri Angliæ audiendum & terminandum, and to do execution thereupon.*

A proviso if a case of difficulty arise, then to respite judgment till the justices of assise come into the county, &c.

So that the commission gives a personal power to every justice of peace by the first clause; but by the second gives to them, or two of them, whereof one of the *quorum*, power to hear and determine felonies, &c.

But besides these powers specially given them by their commission, and the general acts of parliament touching justices of peace, there are divers subsequent statutes, that give them powers, sometimes to one justice, sometimes to two, sometimes in their sessions, sometimes out of their sessions, which it were too long here to recite; I shall only apply myself to that power, that they have by their com-

(a) 34 E. 3. cap. 1. 2 H. 5. cap. 1.

mission or otherwise, in relation to treasons, felonies, and capital offenses.

I. And in the first place touching the second *Assignavimus*, whereby they have power to hear and determine.

Without this clause they have no power to hear and determine felonies or other matters, for the bare making of them justices of peace without this clause doth not give them power to hear and determine indictments: *vide Stamf. P. C. Lib. II. cap. 5. f. 58. a.* And therefore in all returns of making up of records before justices of peace touching indictments or convictions, they must be mentiond to

[44] be justices of peace, *nec non ad diversa felonias, transgressiones, & alia malefacta in eodem comitatu perpetrata audiendum & terminandum assignat*’.

Yet this clause doth not make them justices of *oyer* and *terminer*, for *that* is a distinct commission of another nature, as hath been shewn; and therefore those acts of parliament, that create new offenses and limit them to be heard and determind before justices of *oyer* and *terminer* only, give not thereby power to the justices of peace in such cases, unless also named in the act of parliament.

As the statute of 5 *Eliz. cap. 14.* of forgery, 3 *H. 7. cap. 13.* conspiring the king’s death, 33 *H. 8. cap. 12.* murder in the king’s palace, 8 *H. 6. cap. 12.* embezzeling records, 33 *H. 6. cap. 1.* embezzeling master’s goods, 2 & 3 *E. 6. cap. 24.* stroke in one county and death in another, accessory in one county to a felony in another; for these statutes limit the punishment of these offenses to special judges appointed by the acts themselves, or to justices of *oyer* and *terminer*, under which appellation generally, in statutes, justices of peace come not. 9 *Co. Rep. 118. b. Co. P. C. cap. 41. p. 103. Dalt. cap. 20. (b).*

As touching high treason it is not mentiond in their commission, and they have no power to hear and determine it by the general words of their commission.

But a justice of peace upon complaint of a treason, may examine and commit the offender to prison, and take informations touching it, for it is a breach of the peace, and in order to the conservation thereof, he may commit the offender to gaol, in order to farther proceeding against him by justices of *oyer* and *terminer* or gaol-delivery.

(b) *New Edit. cap. 40. p. 108.*

But by some acts of parliament justices of peace may take indictments of particular treasons, but those presentments they must certify into the king's bench or gaol-delivery, as the case shall require, as upon the statute of 5 *Eliz. cap. 1.* for maintaining the authority of the see of *Rome*, 13 *Eliz. cap. 2.* for bringing in bulls for absolution, *Agnus Dei*, &c. 23 *Eliz. cap. 1.* for withdrawing and reconciling, or being withdrawn from the king's allegiance.

By the statute of 3 *H. 5. cap. 7.* as to treason for clipping, &c. power was given to the justices of peace to inquire [45] and make process thereupon, and antiently that clause was put into their commission, but now omitted; for by the statute of 1 *Mar. cap. 1.* the act of 3 *H. 5. cap. 6.* is repealed, and consequently the act of 3 *H. 5. cap. 7.* that gave power to justices of peace to inquire touching it.

By the statute of 26 *H. 8. cap. 6.* power is given to justices of peace to the adjacent counties to hear and determine counterfeiting and clipping of coin, and murders and other felonies in *Wales*; but this also as to treasons is repealed by the statute of 1 & 2 *P. & M. cap. 10.*

As touching felonies.

It is true, that by the antient statute of 6 *E. 1. cap. 9.* and 4 *E. 3. cap. 2.* murders and manslaughters were to stay till the gaol-delivery.

But by the statutes of 18 *E. 3. cap. 2.* 34 *E. 3. cap. 1.* 17 *R. 2. cap. 10.* tho they do only mention felonies, and do not expressly mention murders and manslaughters, and although the commission of the peace mentions not murders by express name but only felonies generally, yet by these general words in these statutes, and this commission, they have power to hear and determine murders or manslaughters, and thus it has been resolved 5 *E. 6. Dy. 69. a. Pref. to 10 Co. Rep.* against the opinion of *Fitzherbert* in his Justice of Peace, and 9 *H. 4. 24. Coron. 457.*

For till the statute of 13 *R. 2. cap. 1.* a general pardon of all felonies had pardoned murder; and tho that statute require the word *murder* to be expressed, yet that is with relation only to pardons, and not to restrain the extent of the word *felonies* in a commission.

And therefore I know not what my lord *Coke* means in his comment upon the statute of *Gloucester. cap. 9.* 2 *Instit. p. 316.* where he saith, *that justices of peace cannot take an indictment of the killing of a*

man se defendendo, because not within their commission, but justices of gaol-delivery may; for if justices of peace have a power to hear and determine murder or manslaughter, it seems they may take an indict-

[46] ment of *se defendendo*, for the coroner may take an indictment of *se defendendo*. 3 E. 3. Coron. 286. Co. Entries 354.

a. Crompt. Justice 28. a. Holme's case, and so may justices of peace against the opinion of *Stamford, f. 15. b.* But tho the justices have this power, yet they do not ordinarily proceed to the hearing and determining of murder or manslaughter, and rarely of other offenses without clergy, and the reasons are,

1. The monition and clause in their commission *in cases of difficulty to expect the presence of the justices of assise.*

2. The direction of the statute of 1 & 2 P. & M. cap. 13. which directs justices of peace in case of manslaughter and other felonies to take the examination of the prisoner and the information of the fact, and put the same in writing; and then to bail the prisoner, if there be cause, and to certify the same with the bail at the next gaol-delivery; and therefore in cases of great moment they bind over the prosecutors, and bail the party, ifailable, to the next gaol-delivery; but in smaller matters, as petit larciny and some cases within clergy, they bind over to the sessions, *vide Dalt. cap. 20. (c)*; but this is but in point of discretion and convenience, not because they have not jurisdiction of the crime.

By force of this commission they may take an inquisition touching *felo de se*, if not inquired before by the coroners; and tho the coroner's inquisition is to be *super visum corporis*, this needs not, but it is traversable. Co. P. C. p. 55.

They may proceed upon an indictment taken before former justices of the peace in the county by the statute of 11 H. 6. cap. 6. and 1 E. 6. cap. 7. but cannot proceed upon an indictment taken before commissioners of oyer and terminer or gaol-delivery. Lamb. Juslic. p. 551.

But if an indictment be taken before the sheriff in his *Turn* by the statute of 1 E. 4. cap. 2. those indictments are to be delivered to the justices of peace at their next session, and they may proceed upon those presentments.

Tho they have power to hear and determine felonies, yet, 1. They cannot deliver a person by proclamation, (as justices of gaol-delivery

may,) till an inquisition taken; but if an inquisition be taken and an *ignoramus* found, they may deliver him, as it seemeth, *Crompt. de Pace, f. 9. b.* 2. They cannot assign a coroner to an approver.

Tho this be not a commission of *oyer* and *terminer*, yet by the opinion *B. Commission 8.* a commission of *oyer* and *terminer* in the county determines the second *Assignavimus* of the commission of the peace *ad audiendum & terminandum; quod quære.*

A general commission of the peace in a county, in two cases, doth not determine the power of former justices of peace. 1. Where they are justices by charter, such as are in *London, Norwich, &c.* for these are perpetual and not amoveable. 2. Justices in a particular city or corporation, parcel of a county, by commission are not superseded by a new commission granted for the whole county by the statute of 2 & 3 *P. & M. cap. 18.* *Vide statute 11 H. 6. cap. 6.*

If the king by charter grant to a corporation, that the mayor and recorder shall be justices of peace within the city, whereby they are justices in perpetuity by charter, yet if there be no words of exclusion, the justices of peace of the county have a concurrent jurisdiction with the justices by charter, and so it is, if they be justices by commission in the town or city: Or the king, notwithstanding that charter, may grant a commission of the peace specially in that city or county, and they will have a concurrent jurisdiction with the justices by charter.

But if this franchise of being justices be granted, *ita quòd justiciarii comitatûs se non intromittant*, then, tho a subsequent commission be granted in the county at large, it seems they have no jurisdiction in this corporation or town. 20 *H. 7, 8. Case de Abbè de St. Albans; quære tamen*, whether the indictment or session in the franchise be void or only a contempt in the justices: This was heretofore moved between the justices of the peace of *Surrey* and the borough of *Southwark*, but never resolved; but some thought it to be like the case of the bailiwick of a liberty and *retorna brevium* granted, *ita quòd vicecomes non intret*, if the sheriff executes a writ within the liberty, the execution is good, but the sheriff punishable for infringing [48] the franchise.

By the statute of 4 *E. 3. cap. 2.* the justices of the peace ought to deliver all their presentments to the next session of gaol-delivery, where they shall be finally heard and determined.

It is true the justices of peace may so deliver them over, and if they deliver them so over, the justices of gaol-delivery may proceed to determine them, as well as upon the coroner's inquest, namely if the offender be in gaol, but otherwise not.

But this delivery over of the presentments at the session is neither usual nor necessary at this day, for that statute was made when the justices of peace had only power to inquire and not to determine.

But by the statute of 18 E. 3. cap. 2. their commissions where to hear and determine, and so were all the commissions of the peace made after that statute, so that after that statute they might, if they pleased, determine the presentments taken before themselves.

Tho commissioners of *oyer and terminer* may indict and try at the same session, yet (as before) it hath been ruled otherwise in case of justices of peace, unless by consent. But certainly constant usage and learned opinion must give that exposition upon those resolutions, that it must extend only to popular actions or indictments for misdemeanors, and not in cases of felony, for here they may and do proceed *de die in diem* and at the same sessions, and so much is intimated in *Bumpsted's case*, H. 11 Car. 1. (d) *supra*, cap. 4. p. 28. and *Coke 4 Instit.* cap. 28. p. 164. expressly saith it is common experience, and reason speaks for it, as well as in the case of the commission of *oyer and terminer*, the session being in the same county, and with a public summons preceding every general sessions.

The ordinary course of proceeding is in their sessions, which are of two kinds, *viz.* private sessions, or public. Touching the former I shall say nothing, for it is ordinarily for the dispatch of country business, or about ale-houses, poor, &c.

[49] The public sessions are of two kinds, *viz.* the general quarter-sessions, and general sessions that are not quarter-sessions; both are or should be summoned by a precept in the king's name; *quod vide Crompt. Justice* 232. a. or of the Justices. *Lamb. Lib. IV. cap. 2.*

As to the jurisdiction in general both agree, that in either of these general sessions of the peace they may proceed touching those matters that are within their commission, as to take indictments, try felons, &c.

But by particular acts of parliament some things are limited to the quarter-sessions, and cannot be proceeded in at other general sessions,

(d) *Cro. Car.* 438. 448.

as

as 5 & 6 E. 6. cap. 14. for ingrossing, 1 H. 7. cap. 7. hunting, 2 & 3 P. & M. cap. 8. highways, 5 Eliz. cap. 9. perjury, 5 Eliz. cap. 12. licensing badgers, 7 E. 6. cap. 5. wines, and divers others, *de quibus vide Lamb. Lib. IV. cap. 19.*

These quarter-sessions were by several acts of parliament appointed to be held at several times, by 25 E. 3. cap. 8. at the *Annunciation*, *St. Margaret*, *St. Michael*, and *St. Nicholas*.

By 36 E. 3. cap. 12. within the *ut*as of *Epiphany*, within the week of *Lent*, between *Pentecost* and *Midsummer*, within eight days of *St. Michael*.

By 12 R. 2. cap. 10. the sessions are set at liberty, *viz.* to be held every quarter of the year at least; only *Middlesex* is excepted by 14 H. 6. cap. 4.

By the statute of 2 H. 5. cap. 4. in the first week after *St. Michael*, *Epiphany*, clause of *Easter*, and translation of *St. Thomas* the martyr.

By the statute of 33 H. 8. cap. 10. the *Tuesday* after *Easter* week is expounded to be in the week after *Clausum Paschæ*, for the sessions to be held; yet *Clausum Paschæ* or *Low-Sunday* is the first day of that week.

The strict regular exposition of the statute of 2 H. 5. for the week after *Michaelmas*, &c. is, that if *Michaelmas* fall upon the *Sunday* or *Monday*, the quarter-sessions in strictness should be held in the ensuing week, and not the same week.

Yet it is very plain, that the quarter-sessions are variously held in several counties, some at one day, some at another, [50] yet it hath been ruled, that these are each of them good quarter-sessions within the several acts that relate to quarter-sessions; for these acts, especially that of 2 H. 5. is only directive and in the affirmative, and therefore, tho the sessions are held at another day according to the general direction of the statute of 12 R. 2. yet they are quarter-sessions.

Nay in *Middlesex*, where by the statute of 14 H. 6. there are regularly but two sessions, yet they may hold quarter-sessions (as indeed they do,) in that county: tho these sessions are not precisely held at the times prefixed by 2 H. 5. yet they are quarter-sessions if held quarterly; and so it was agreed by the justices upon a late act (e) this session of parliament for the taking and subscribing the oaths of supremacy.

(e) 25 Car. 2. cap. 2.

II. I shall now proceed to some few observations touching the power of particular justices of peace by virtue of their first *Assignamus* in the commission, which makes every particular justice a justice of peace, and gives him power to conserve the peace.

Concerning their power to bail or commit persons brought before them for felony *vide infra in capite de bail & mainprise (f)*, & *nota statute. 34 E. 3. cap. 1. & alia statuta.*

They are to execute their authority as justices of peace within the county wherein they are justices.

If a justice of peace lives or be out of the county, wherein he is justice, he cannot by his warrant fetch a person out of the county, where he is justice, to come before him in the county, where he is; 13 E. 4. 8. b. *Plowd. Com. 37. a. Platt's case.*

He cannot do a judicial act out of the county wherein he is a justice of peace, as take recognizances, take examinations, commit offenders, &c. but he may do a ministerial act, as to examine a party robbed, whether he knows the felons according to the statute of [51] 27 Eliz. cap. 13. H. 6. Car. 1. B. R. *Helier's case, Croke, p. 211, 212.* yet *quære* of recognizances and examinations, for they are acts of voluntary jurisdiction, and therefore it seems may be done out of the county, as well as a bishop may grant administration, institution, or orders out of his diocese: But indeed imprisoning of a person for not giving recognizance, or committing a person for a crime, are acts of compulsory jurisdiction, and may not be exercised out of his county (g).

Yet suppose a man be a justice of peace in *London* and in *Middlesex*, as the recorder is, whether he may not commit a person in *Middlesex* brought out of *London* or *à converso*, it seems it hath been always practised, for he is in commission in both places.

If *A.* commits a felony in the county of *B.* where he lives, and goes into the county of *C.* and is there taken, a justice of the peace

(f) cap. 15.

(g) By 9 Geo. 1. cap. 7. §. 3. "If a justice happens to dwell in any city or other precinct, that is a county of itself, situate within the county at large, for which he shall be appointed a justice, tho not within the said county, he may grant warrants, take examinations, and make orders for any matters, which any one justice may act in at his dwelling-house, tho out of the county whereof he is appointed a justice, and in some

"city or precinct adjoining, that is
"a county of itself; provided, that no
"power is thereby given to the justices
"for the county at large to hold their
"sessions in cities or towns, that are
"counties of themselves, nor to justices,
"sheriffs, constables, or other peace-offi-
"cers of the county at large to act or
"intermeddle in any matters arising with-
"in such cities or towns, otherwise than
"as if the said act had never been made."

of

of the county of *C.* may take his examination and informations in the county of *C.* tho the felony were committed in the county of *B.* yet *quære*, whether upon his arraignment in the county of *B.* those examinations can be given in evidence; I have not allowd them, because tho he may commit and examine, and give an oath to the informers, yea and bind them over to give evidence or commit them, yet that is but for necessity of preserving the peace, for he hath really no jurisdiction in the case.

And *note*, the custom of *London* enables the justices of gaol-delivery to sit at *Newgate*, which is in *London*, both for *Middlesex* and *London*, but the justices of the peace for *Middlesex* sit only in *Middlesex*, and the justices of the peace for *London* in *London*.

By the statute of 1 & 2 Ph. & Mar. cap. 13. they ought to take the examinations of felons (without oath,) and the [52] informations of accusers or witnesses (upon oath,) and return them to the justices of gaol-delivery.

And these examinations may be read as evidence against the prisoner, and so may the informations of witnesses taken upon oath, if they are dead or not able to travel, for they are judges of record, and the statute enables and requires them to take these examinations; but then oath is to be made in court by the justice or his clerk, that these examinations and informations were truly taken.

If *A.* brings *B.* before a justice of peace for suspicion of felony, if he can testify materially against him, he may bind him over to prosecute; and, if he refuses, the justice may commit him.

The justices of the peace have jurisdiction of felonies arising within the verge. 4 Co. Rep. 46. a. *Wigg's* case.

The justices of the peace in their sessions may proceed to outlawry in cases of indictment found before them, and that by the common law; and in cases of popular actions may proceed to outlawry by the statute of 21 Jac. cap. 4.

But they cannot issue a *capias utlegatum*, but must return the record of the outlawry into the king's bench, and there process of *capias utlegatum* shall issue. *Dalt.* p. 406. (*h*).

See Burn, Tit. Justices of Peace. 1 Blackf. Com. ch. 9. p. 351, &c. and Index to
2 Hawk. P. C. Tit. Peace.

(*b*) *New Edit.* p. 672.

C H A P. VIII.

Concerning the coroner and his court, and his authority in pleas of the crown.

CORONERS are of three kinds, viz. 1. *Virtute officii*. 2. *Virtute cartæ sive commissionis*. 3. *Virtute electionis*, as the coroners of counties.

I. The coroner *virtute officii* is the chief justice of the king's bench, who by virtue of his office is the chief coroner of *England*, 4 *Co. Rep.* 57. *b.* in case *de comminatie de Sadlers*, and therefore it is there said, "That in the time of *H. 7.* it was resolved, if a man be slain in open rebellion, the chief justice upon the view of his body may make a record thereof and send it into the king's bench, and thereupon the party slain shall forfeit his lands and goods," which may be true as to goods, but not as to lands, because none can be attainted after his death but by act of parliament.

But of this hereafter.

II. Coroners by charter or commission or privilege: And these ordinarily were made by grant or commission without election; such are the coroners of particular lords of liberties and franchises, who by charter have power to create their own coroners, or to be coroners themselves: Thus the mayor of *London* is by charter coroner of *London*, the bishop of *Ely* hath power to make coroners in the isle of *Ely* by the charter of *H. 7.* Queen *Catharine* had the hundred of *Colridge* granted to her by the king 35 *H. 8.* with power to nominate coroners. 9 *Co. Rep.* 29. *b.* *Ameredith's case*.

And therefore by the statute of 28 *E. 3. cap. 6.* where the power of electing coroners is confirmed to the counties, yet there is a saving to the king and other lords, which ought to make such coroners, their feignories and franchises, so that the king may grant coroners [54] within certain precincts; and lords of franchises, that have power to nominate coroners by charter, may still do it without election.

There have been two great precincts, that by the king's grants have power of granting or having coroners, namely, the jurisdiction of the admiralty, and the verge.

As

As touching the former I have not seen the grant, but I have heard the lord admiral is either made coroner, or hath power to make them within his jurisdiction; and of the death of a man or other articles belonging to the coroner arising upon the high sea, inquisitions have been usually taken by the coroners appointed by the king or his admiral, and here the coroners of the county have no jurisdiction.

But of deaths of men happening upon arms of the sea below the bridges within the bodies of counties, as upon *Thames* or *Severn*, &c. in ships there hovering, tho the coroner of the admiralty hath jurisdiction, yet it is not exclusive of the jurisdiction of the coroner of the county, who may inquire in any great river upon these articles, where a man can see from one side to the other, 8 *E. 2 Coron.* 399. Only the inquisitions taken before the coroner of the admiral are returned before the commissioners upon the statute 28 *H. 8. cap.* 15. The inquisition before the coroner of the county is to be returned before the commissioners of gaol-delivery for the county.

The other great jurisdiction is the coroner of the king's house, usually called the coroner of the verge, who it seems antiently was appointed by the king's letters patent; but by the statute of 33 *H. 8. cap.* 12. the granting thereof is settled in perpetuity in the lord steward, or lord great master of the king's house for the time being.

Antiently the coroner of the verge had power to do all things within the verge belonging to the office of the coroner, exclusive of the coroner of the county; but because the king's court was moveable often, by the statute of *Articuli super cartas, cap.* 3. (a), it is ordained, that of the death of a man the coroner of the county shall join in inquisition to be taken thereof with the coroner of the king's house; and if it happen it cannot be determined before the steward, [55] process and proceeding shall be thereupon had at common law.

But yet in that case of death within the verge, the coroner of the county cannot take an inquisition without the coroner of the verge; and if he doth, it is void; but if one person be coroner of the county and also of the verge, the inquisition before him is as good as if the offices had been in several persons, and taken by both.

And tho the court remove, yet he may proceed upon that inquisition, as coroner of the county. 4 *Co. Rep.* 45 & 46 *Wigg's case.*

But if a murder or manslaughter be done within the precincts of the king's palace limited by the statute of 33 *H. 8. cap.* 12, then by that

(a) 2 *Co. Instit.* p. 550.

statute the inquisition shall be taken by the coroner of the household, without the adjoining or assisting of any coroner of any county, by twelve or more of the yeomen officers of the king's household; and this is enacted to be as sufficient, as if taken also by the coroner of the county, and the method of the return and proceeding upon those inquisitions before the lord steward is therein declared and enacted.

III. The general coroners of counties.

These by the statute of *West.* 1. *cap.* 10. (*b*), and 28 *E.* 3. *cap.* 6. are eligible by the county in the county-court by the king's writ *de coronatore eligendo*, and sworn by the sheriff for the due execution of their office. *F. N. B.* 163.

The statute of *Westm.* 1. directs they should be knights, but that is out of use; but by the statute of 14 *E.* 3. *cap.* 8. they ought to have sufficient lands in the county; and by the statute 28 *E.* 3. *cap.* 6 they ought to be lawful and fit men.

In as much as their office is by election, their offices do not determine by the demise of the king, as sheriffs do. *Dy.* 165. *a.* (*)

And in as much as they are elected by the freeholders of the county, [56] if they be insufficient and not able to answer their fines, and perform the duties of their place, the whole county shall be answerable for them and their miscarriages, and amercements or fines shall be imposed upon them for the same, (*viz.* if upon process against the coroner for his fine or amercement the sheriff return *nihil habet*,) and process shall go against the whole county, because elected by them. 2 *Co. Instit.* p. 175.

In some counties there be only two coroners, in some four, in some six, and by the statute of 34 & 35 *H.* 8. *cap.* 26. in each county in *Wales*, and in *Chester* two.

If there be above two coroners in a county, and a writ be directed *coronatoribus*, tho one die, yet as long as the plural number remain, a return by the coroners is good; but if there be but only one survivor, he cannot execute the writ and return it till another be made. 14 *H.* 4. 35. *a.* 31 *Affix.* 20. But if there be two coroners, in a county or more, one may execute the writ, as in case of an *exigent*, but the return must be in the name of the *coronatores*. 14 *H.* 4. 34. *b.* per *Hank.* 39 *H.* 6. 41.

But tho there be many coroners in the county, an inquisition *super visum corporis* may be taken by any one of them. *Stamf. P. C.* p. 53. *a.*

(*b*) 2 *Co. Instit.* p. 174.

(*) See 4. *E.* 4. 43. *a.* in notes ad p. 101.

As coroners may be elected by writ *de coronatore eligendo*, so they may be amoved for reasonable cause, and new ones chosen in their room by writ.

And altho that cause be not traversable, 5 *Co. Rep.* 58. *b.* yet if it be false, he may have a *superfedeas* to that new writ. *F. N. B.* p. 163.

Thus far concerning the constitution of these officers and their different kinds; now touching their jurisdiction and proceeding.

Before the statute of *Magna Carta*, cap. 17. (c) the coroner held pleas of the crown, by that statute *nullus vice-comes, constabularius, coronator vel alii ballivi nostri teneant placita coronæ*, so that thereby their power in proceeding to trial or judgment in pleas of the crown is taken away.

But yet they retained a jurisdiction still as to matters of inquiry, taking of appeals, &c. all which is set down at large [57] in the statute of 4 *E.* 1. styled *De officio coronatorum*, viz. 1. Of the death of a man, whether by felony, misfortune, &c. viz. *de subito mortuis*. 2. Of *treasure-trove*. 3. Of appeals of rape. 4. Appeals *de plagis* & *mahemio*. 5. Of deodands. 6. Of wreck of the sea; and 7. By some, of breach of prison (d). I shall reduce them to these four, viz.

1. His power to take inquisitions *super visum corporis*. 2. His power to take appeals. 3. His power to take the accusation of an approver. 4. His power to take abjuration.

I. For inquisitions.

Regularly the coroner hath no power to take inquisitions, but touching the death of a man and persons *subito mortuis*, and some special incidents thereunto.

If any person dies suddenly, tho it be of a fever, and the township bury him before the coroner be sent for, the whole township shall be amerced. *Itin. North. Coron.* 319. *Nota*, this case is misprinted, I have seen an antient transcript at large of the *Iter* of North'ton, and perused this very case, which in *libro meo* f. 52. *b.* is *morust de feyme*, viz. starved by hunger; for tho a man dies suddenly of a fever or apoplexy, or other visitation of God, the township shall not be amerced, for then the coroner should be sent for in every case; but if it be an unnatural or violent death, then indeed if the coroner be not sent for to view the body, the town shall be amerced.

And so it is if the vill leaves a body, that died of a violent death, above ground unburied, the township shall be amerced, 3 *E.* 3. *Coron.* 339. and the amercements in these cases may be set upon the presentment of the grand inquest, or upon the presentment of the coroner.

But if a prisoner *in gaol* dies a natural death, yet regularly the gaoler ought to send for the coroner to inquire, because it may be possibly presumed, that the prisoner died by the ill usage of the gaoler.

[58] And if this death happens in the king's bench, the clerk of the crown, who is the coroner for that court, is to view the body. 3 *E.* 3. *Coron.* 292. 8 *E.* 2. *Coron.* 421.

If the coroner have notice and comes not in convenient time to view the body and take his inquisition upon the death of him, that thus dies suddenly, and therefore upon a presentment by the grand inquest of a death by misadventure, if the like presentment be not found in the coroner's roll, he shall be fined and imprisoned. 3 *E.* 3. *Coron.* 292.

And by the statute of 1 *H.* 8. *cap.* 7. he shall forfeit forty shillings for every such default, and the justices of the peace and justices of assize have power to enquire of those defaults, and this without any fee to be taken by the coroner. But by the statute of 3 *H.* 7. *cap.* 1. if the coroner be remiss, and makes not inquisitions upon persons slain, or doth not return the same to the next gaol-delivery, he is to forfeit 5*l.* for every default.

The coroner cannot take an inquisition but upon the view of the body, and if he doth, such inquisition is void; and the reason is, because oftentimes much of the evidence ariseth upon the view, for the inquisition ought to contain the manner of his death, the place, length and depth of the wound, &c.

And therefore tho where there are many coroners, one may take the inquisition. *Stamf.* 53. *a.* yet it cannot be done by deputy, for by the statute of *Exon* 14 *E.* 1. the coroner is, to view the body and take the inquisition in his own person. *Crompt. Justice, f.* 227. *a.*

And therefore if the body be buried before the coroner comes, tho the coroner ought to record it, and the township shall be thereupon amerced, as before is said, yet the coroner ought to take up the body, and take his view thereof, if there be any possibility of it, and therefore the body hath in such case been taken up fourteen days after,
and

and an inquisition thereupon taken. 2 R. 3. 2. a. 21 E. 4. 70, 71. *Wingfield's case*.

And therefore if the coroner take an inquisition without view of the body, he may take a second inquisition *super visum corporis*, and that second inquisition is good for the first was absolutely void. 2 R. 3. 2. 21 E. 4. 70. [59]

But if a coroner takes an inquisition *super visum corporis*, and after this another coroner takes an inquisition upon the same matter, the second inquisition is void, because the first was well taken. M. 6 R. 2. Coron. 107. *Crompt. Justic.* 229. b.

If a coroner takes an inquisition *super visum corporis* (as upon a *felo de se*), and that is sent into the king's bench and quashed, the coroner may take a new inquisition *super visum corporis*.

But upon a surmise, that the coroner ought to have found him *felo de se* and hath not, there shall be no *melius inquirendum* directed to the sheriff; I have known it often denied, and it was held it was within the restraint of the statute 28 E. 3. cap. 9.

But possibly a commission or writ may issue for the inquiry of the goods of a felon not mentioned in the coroner's inquisition.

If the coroner do not inquire of a *felo de se*, or of any other sudden death, the justices of the peace or *oyer* and *terminer* may enquire thereof, and so may the justices of the king's bench, but then that presentment is traversable; but it is held that the presentment of the coroner of a *felo de se* is not traversable, *de quo supra*, Part I. cap. 31. p. 414. *Co. P. C.* cap. 8. p. 55.

When notice is given to the coroner of a misadventure, he is to issue a precept to the constable of the four or six next townships to return a competent number of good and lawful men of their townships, *viz.* twelve at least to make an inquisition touching that matter. 4 E. 1. *Officium coronatoris*.

If they make not a return, or the jurors returned appear not, their defaults are to be returned by the coroner, and the constables or jurors in default shall be amerced before the justices in *eyre* antiently, but now before the justices of gaol-delivery.

But if the jurors appear, by *Crompt. Justice*, f. 226. b. they are not challengeable by either party.

Yet in *Mich. 4 Car. B. R.* Sir William Withipole's case [60] by the greater opinion of all the judges of England the statute of 11 H. 2, cap. 9. extends to inquisitions before the coroner, and

that if in an inquest before the coroner one of the jurors be outlawed tho but of trespass, this is a good plea to a coroner's inquest of murder *Cro. p. 134.*

The jury is to be sworn and charged to inquire upon the view of the body how the party came by his death, whether by murder by any person, or by misfortune, or as *felo de se.*

In such cases, where the coroner's inquest is conclusive, (as it is commonly held in the case of *felo de se,*) the coroner must hear evidence as well against the king's interest as for it, and that upon oath, for there is no person to be condemned to death, but only the fact to be inquired into.

And so it was ruled in *Barclai's* case who drowned himself, and the coroner would not admit witnesses to prove him to be *non compos mentis* at the time, but shut them out, and only took witnesses for the king; and for this cause the coroner was reprehended by the court of king's bench, and the inquisition set aside and not suffered to be filed, and a new inquisition taken, whereby it was found he was *non compos*, for in this case there was no person put to answer; *de hoc vide supra, Part I. p. 415.*

But it hath been held, that if a person be killed by another person, and it be certainly known that he killed him, the jury must hear evidence only for the king; and whether the killing were by malice or without malice, nay tho it were such a killing as is justifiable, as an officer killing one that assaults him in doing his office, yet the inquest must find it murder, because the party shall be put to answer, and upon not guilty pleaded the whole matter will come to be tried by the petit jury, where the evidence of both sides may be openly heard in court, and such direction given as the nature of the fact requires, *viz.* to be murder, manslaughter, or *per infortunium*: and thus it hath been commonly practised of later years.

But it seemeth to me, that this is neither reasonable nor agreeable
[61] to law or antient usage, but is a novelty as to the case of the coroner's inquest, tho it may be and is reasonable and fit in case of an indictment by the grand inquest of the county, for these reasons: 1. Because the coroner's inquest, is to inquire *truly* (*e*) *quomodo ad mortem devenit*, and is rather for information of the

(e) Why should not this argument hold as well in the case of an indictment by the grand inquest, since they are likewise by

their oath to present the truth, the whole truth, and nothing but the truth? *vide infra, p. 157.*

truth of the fact as near as the jury can assert it, and not for an accusation. 2. Because tho the prisoner may be arraigned upon the coroner's inquest, if it find it murder or manslaughter, yet neither the court nor the prosecutor is concluded by it, but a bill of murder may be preferred to the grand inquest; and upon that new presentment the party may be arraigned and tried, tho the coroner's inquest arises only to manslaughter, or it may be to *se defendendo* or chance-medley. 3. And accordingly the antient practice hath been, for the coroner's inquest to find the matter as they judge it was: *vide* 26 *Eliz. Crompt. Justice, f. 28. a. Holmes's case, Coke's Entries 353. b.* and very often in the antient *Iters* of *E. 2.* and *E. 3. de quo supra.*

And therefore the difference of the penning of the act of 1 & 2 *P. & M. cap. 13.* touching the examinations taken by the justices of the peace and the coroner is observable: The justices of the peace are to put into writing the informations against the felon of the fact and circumstances thereof, or *so much thereof as shall be material to prove the felony*; but the coroner is to put into writing *the effect of the evidence given to the jury before him being material*, without saying *so much as is material to prove the felony*, but the whole evidence given whether to prove or disprove the felony; and all this evidence is to be upon oath before the coroner's inquest, whether it makes for or against the prisoner: but indeed when the prisoner is to be tried upon that indictment, or the indictment of the grand inquest, those witnesses, that acquit the prisoner, are not to be heard upon oath at his trial, unless the prosecutor desires it (*f*).

So that I do conceive the coroner's inquest ought in all cases to hear the evidence upon oath, as well that which [62] maketh for, as that which maketh against the prisoner, and the whole evidence ought to be returned with the inquisition.

Now sudden violent deaths, which are all within the coroner's office to inquire, are of these kinds. 1. *Ex visitatione Dei.* 3. *Per infortunium*, where no other had a hand in it, as if a man falls from a house or cart. 3. By his own hand, as *felo de se.* 4. By the hand of another man, where the offender is not known. 5. By the hand of another, where he is known, whether by murder, manslaughter, *se defendendo*, or *per infortunium.*

(*f*) This was indeed the practice, tho unsupported by any authority in law; but now by 1 *Ann. cap. 9.* the witnesses on

the behalf of the prisoner in all trials for treason or felony are to give evidence upon oath.

1. If the inquest find that he died *ex visitatione Dei*, there is no more to be done, only the inquisition, together with the examinations, are to be returned to the next gaol-delivery, by the statute of 3 *H. 7. cap. 1.*

2. If the inquest find the death *per infortunium* simply, as by a fall &c. then the coroner is to take the examination, and return the same with the inquisition to the next gaol-delivery, and to inquire of the deodand, and the value, and in whose hands, and to seize and deliver the same to the township to be answerable for the same to the king, by the statute of 4 *E. 1. De officio coronatoris.*

But if the person were drowned in a pit, the coroner shall command the vill to stop it, and if it be not done, the vill shall be amerced in eyre, or before justices of gaol-delivery. 8 *E. 2. Coron. 416.*

And note, that in no case the coroner sets any fine or amercement as for non-appearance of juries or constables, escapes of townships, &c. but only presents it to the next justices in eyre, or now to the next gaol-delivery, and they impose the fine.

3. If the inquest find a man *felo de se*, they ought to find the special matter, and also what goods and chattels he had, of what value, and seize and deliver the same to the township to be answerable to the king or his almoner, or the lord of the franchise, to whom they belong, and shall bind over the first finder of the body to the next gaol-delivery.

[63] 4. If the party be slain and the felon is not known, they are to find their inquisition accordingly, and shall bind over the first finder of the body to the next gaol-delivery, and return his examinations, together with his inquisition, by the statute of 1 & 2 *P. & M. cap. 13.*

And note, that the antient manner of inquiry in this case, whether by the coroner or justices in eyre, was, 1. *Quis primus inventor?* 2. *An malè creditur?* If so, then if he were present, he might be arraigned; if absent, they went on to the outlawry against him; but if they answered, *non malè creditur*, then he was discharged. 35 *H. 6. 15. a. B. Conspiracy 4.*

5. But if the person was slain, and the party that did it was known, and the inquisition found him guilty of the death, or that he died by his hand, there were these proceedings, namely,

The inquest were also to inquire of all that were present, aiding and abetting.

They

They shall also inquire of all accessaries *before* the fact, but they cannot inquire of accessaries *after* (*), and therefore a presentment of a *fugam fecit* upon an accessory *after* is void. *Stamf. P. C.* 183, 184. 4 *H.* 7. 18. *b.*

If they find a man guilty as principal or as accessory *before*, they are also to inquire whether he fled for the same; for if the party be acquit upon his trial, nay tho the petit jury upon his trial find him not guilty, nor that he fled, yet this inquisition before the coroner shall cause a forfeiture of his goods, for it is not traversable. *Dy.* 238. *b.* *Stamf. P. C.* p. 183. *b.* (†).

If a party be found guilty by the coroner's inquest, or that he fled, they are also to inquire of his goods and chattels; and by the antient law the coroner was presently thereupon to seize and inventory his goods, and delivery them to the *villata* to be answerable to the king for them, as appears by the statute of 4 *E.* 1. how far this is altered by the statute of 1 *R.* 3. *cap.* 3. *vide quæ supra*, Part I. *cap.* 27. p. 365.

But it seems, that if there be a presentment before the coroner of a *fugam fecit*, the statute of 1 *R.* 3. takes no place as to that, [64] because, whether convict or acquit, the *fugam fecit* stands as an unavoidable forfeiture, and therefore the coroner may without question seize the goods so found by inquisition upon a *fugam fecit*, and commit them to the township.

If the persons, that are found guilty by the inquest, be taken, the coroner may and must commit them to the sheriff, and he is to send them to the gaol by the statute of 4 *E.* 1. But if any were present and found not guilty, the coroner was to bind them over to the next gaol-delivery by the same statute, and to record their names in his roll: This was to the intent, that if farther evidence was discovered against them, they might be there proceeded against, if not, then they might be used as witnesses; but the statute of 1 & 2 *P. & M.* *cap.* 13. hath made better provision; *de quo infra*.

If the parties found guilty as principals or accessaries *before* by the coroner's inquest be not to be found, the coroner might proceed to the outlawry against them at common law, *quod vide* 27 *Affiz.* 47. *viz.* by process of *capias* to the sheriff; and if they were returned *non inventi*, then they were demanded at five counties and outlawed: *vide Crompt. Justice*, p. 226. *b.*

(*) *Vide* Part I. p. 416. *in notis.*

(†) *Vide* Part I. p. 363 & p. 417.

But now that course is altered, and the coroner ought not to proceed to the outlawry, but is to return his inquisition to the next gaol-delivery by the statute of 3 *H. 7. cap. 1.* and the justices of gaol-delivery are to proceed against the offenders, if in gaol; and if not in gaol, then to certify the inquisition into the king's bench, and there process of outlawry to go against them upon that inquisition.

And by the statute of 1 & 2 *P. & M. cap. 13.* the coroner is to take the examinations against the principals and accessaries *before*, and put them in writing, and bind over witnesses by recognizance to the next gaol-delivery, and then to return their examinations, recognizances, and inquisitions upon pain of 40*s.* for every default.

In case of an indictment of murder or manslaughter by the grand inquest, if the prisoner appears, pleads, and be acquitted by the petit jury, they say so and no more, only they inquire of the flight.

[65] But if a person be found guilty by the coroner's inquest, and plead and be acquitted, yet in as much as the coroner's inquest have found that he was kild, the court gives credit to it, and therefore the petit jury must also give in, who it was that kild him, which serves as an indictment against that other person. 13 *E. 4. 3. b.* 14 *H. 7. 2. b.* and commonly if they cannot tell, they give in some fictitious name as *John a-Noke*, which serves the turn.

If there be an inquisition of manslaughter or murder, and also an indictment by the grand inquest of the same offense, and he is arraigned and found not guilty upon the indictment by the grand inquest, yet it is necessary to quash the other inquisition or arraign the party upon it, and he is to plead *autrefois acquit*, or *not guilty*, and so be acquit upon that also, for it otherwise stands as a record against him, upon which he may possibly be outlawed.

But if both indictments be of the same nature and for the same offense and be good, he may be arraigned and tried upon both at once.

By the statute of *Westm. 1. cap. 10.* the coroner was to take nothing for the execution of his office touching the death of a man.

But by the statute of 3 *H. 7. cap. 1.* in cases of murder or manslaughter he was to have the fee of 13*s.* 4*d.* out of the goods of the felon, or out of the amercement set upon the township for an escape.

But by the statute of 1 *H. 8. cap. 7.* for an inquisition upon the death of a man by simple misfortune or misadventure, he is to take nothing upon pain of forfeiting forty shillings.

1. By

1. By what hath been before said it appears, that the coroner hath power to take an inquisition of felony of the death of a man, and likewise of certain incidents thereunto. 1. Of accessaries before the fact, but not of accessaries after. 2. Of the escape of the manflayer, that thereupon the township may be amerced, which is farther confirmed by the statute of 3 *H. 7. cap. 1.* 3. Of his flight. 4. Of his goods and chattels: But he hath no power to take an inquisition of any other felony, tho in some cases he hath power to take appeals of other matters, as shall be said hereafter. 2 *Co.* [66] *Instit. p. 32.* Only by custom in *Northumberland* the coroner hath power to inquire of other felonies. 35 *H. 6. 27. b.*

But it is said that he may take the confession of him, that breaks prison, and upon his record thereof the party shall be hanged. 8 *E. 2. Coron. 435.*

2. But altho he hath power to take an inquisition touching the death of a man, it must be *super visum corporis*, and not otherwise.

And therefore in antient times if a man were hurt in the county of *A.* and died in the county of *B.* the coroner of the county of *B.* could not take an inquisition of his death, because the stroke was not given in that county, nor could the coroner of the county of *A.* take an inquisition, because the body was in the county of *B.* but they used to remove the body into the county of *A.* and there the coroner of that county to take the inquisition. 6 *H. 7. 10. a.*

But this would not avail, till the statute of 2 & 3 *E. 6. cap. 24.* gave a remedy in this case by indicting and trying him in the county where he died.

But if he were stricken and had also died in the county of *A.* and the body had by some means been after removed into another county, he ought to be removed into the county of *A.* where he was stricken and died.

3. That altho he might take an indictment of death, and at common law proceed to outlawry, yet by the statute of *Magna Carta, cap. 17.* he was disabled to hear or determine *that* felony, or to make execution upon the outlawry.

4. But tho the coroner could not take any inquisition but *super visum corporis*, yet in some cases, that were not felony, he might take an inquisition; as 1. *De Thesauro invento.* 2. Of wreck and royal fish. 3. And it seems he had a power to attach a person, that had dan-

dangerously wounded another, and that not only upon an appeal of mayhem, but also *ex officio*, as a thing tending to danger of death; *quod vide* 4 E. 1. *De officio coronatoris*.

[67] And thus far touching inquisitions before the coroner.

II. The second thing, wherein the coroner's power lies, is taking of appeals, namely appeals of murder, appeals of robbery, appeals of rape, appeals *de plagis & mahemio*; and this appears by the statute of 4 E. 1. *De coronatoribus*.

These appeals can be taken only of facts done within the county, whereof he is coroner. *Stamf. P. C. f. 63. a. (g)*.

This appeal is to be by bill in proper person, and before the coroner and sheriff: *vide stat. 34 H. 7. cap. 1*.

But yet the coroner is the principal judge, and therefore a *certiorari* to remove such a bill may be to the coroner alone. 4 H. 6. 16. a. *Dy. 222. b.* or to the coroner and sheriff, because by the statute of *Westm. 1. cap. 10.* the sheriff hath a counter-roll. 38 E. 3. 14. b. *Register 284. a. Dy. 223. a.* But not to the sheriff alone neither for appeals nor outlawries, unless in *London. Dy. 317. a.*

Altho by the statute of *Magna Charta, cap. 17.* the coroner cannot determine the appeal, yet he may do these things. 1. He may record the nonsuit of the plaintiff in an appeal by bill before him, 22 *Affiz. 93.* 2. He may award a *capias* and *aliàs* to the sheriff, and may thereupon demand the defendant at five counties, and outlaw the defendant, 22 *Affiz. 97.* tho *Stamford* makes a doubt of it, *Lib. II. cap. 14. f. 64. a.* and thinks that the appeal must be removed by *certiorari* into the king's bench, and there only process of outlawry can issue; but when the appeal is sued before the coroner and sheriff, to have the appeal determin'd it must be removed into the king's bench by *certiorari*.

III. The third power of the coroner is to take the accusation of an approver, namely when a person is indicted before justices of gaol-delivery or in the king's bench for any felony, he may confess the offense, and impeach or accuse or appeal others of felony, and thereupon the court assigns him a coroner to take his confession.

The coroner upon an appeal by an approver may take an appeal of
[68] the approver against any person for any felony or treason committed in the same county, or in any other county. 19 E. 3. 42. *Coron. 462.*

If the appeal be in the same county, it seems the coroner may make a precept to the sheriff to take the person appeal'd; but if he be only a coroner of a franchise, it seems he may make a precept to the sheriff to attach him, *quære*; but howsoever he cannot make a precept to the bailiff of the franchise, because the bailiff of a franchise cannot execute a process within his franchise, but by the precept of the sheriff. 29 E. 3. 42. *Coron.* 462.

And therefore it seems in that case he must return the appeal before the judge of gaol-delivery within the franchise, and he may make process within the franchise to the sheriff; *vide* the case of *Ely*, 29 E. 3. 41. *b. quære*, how the usage is there, *viz.* whether the judge makes process out of the liberty, and to whom.

But if the appeal be of a felony or treason out of the county, the same must be removed or certified to the justices of gaol-delivery, and they may make process into any county of *England* to take the person appeal'd; and so the case of an appeal by an approver differs from the appeal by a person grieved. 5 H. 5. *Coron.* 437. 29 E. 3. 42. *Coron.* 462. *Stamf. P. C. Lib. I. cap. 52. f. 53.*

IV. The fourth power of the coroner is to take the confession of a felony by a felon, tho the felony were committed in any foreign county, and to take his abjuration. *Stamf. f. 53.*

But by the statute of 1 Jac. cap. 25. continued by 21 Jac. cap. 28. the whole business of sanctuary, and the abjuration before the coroner relative to sanctuary, is taken away; and therefore it is needless to repeat the office or power of the coroner in relation to sanctuary *Co. P. C. cap. 51.*

See 1 Blackf. Com. ch. 9. pa. 346. 4 Blackf. Com. ch. 19. pa. 274. ch. 21. p. 292. Index to 2 Hawk. p. C. Tit. Coroner and Burn. Tit. Coroner.

C H A P. IX.

[69]

Concerning the sheriff, his power in pleas of the crown, as well by commission, as in his Turns.

THE power of the sheriff to hold pleas of the crown, as well as the coroners and other the king's bailiffs, is restrained and taken away by *Magna Charta*, cap. 17. recited in the former chapter.

Yet

Yet after that statute he had power to receive indictments and presentments of felony, tho he had not power to determine them.

And this power was of two kinds, *viz.* special by virtue of a special writ or commission, and general or *virtute officii* in his *Turn*.

The former of these powers, *virtute brevis* or *commissionis*, continued in use till the statute of 28 *E. 3. cap. 9.* and by that statute all former commissions and writs of that nature are repealed; and enacted, that for the future no such commission or commissions shall be granted.

And therefore *H. 37 Eliz. B. R.* where the coroner found a death *per infortunium*, and it was surmised for the king, that he was *felo de se*, and a *melius inquirendum* prayed to the sheriff; ruled that none should issue, because contrary to the statute.

The latter power of the sheriff is *virtute officii*, and this still continues in the sheriff, namely, that he hath power in his *Turn* to take inquisitions of felonies, that were felonies at common law; but the sheriff cannot take any inquisition of any felony created by act of parliament, unless the same act likewise gives him jurisdiction; and therefore the sheriff in his *Turn* cannot take an inquisition of rape.

[70] This court is a court of record, and the sheriff or his steward or clerk is judge in it, the style *Placita coram vicecomite com' S. in Turno*.

The indictments taken here have these requisites.

1. That the courts be held *infra mensem Paschæ, & mensem Michaelis* by the statute of 31 *E. 3. cap. 15.* or else they lose their turn for that time, which hath been expounded their court so held for that turn only shall be void. *Stamf. P. C. f. 84. b. 6 H. 7. 2. a. 38 H. 6. 7. a.*

2. The indictment must be under the seals of the indictors, and by twelve jurors at least by the statute of *Westm. 2. cap. 13. (a).* And by the statute of 1 *E. 3. cap. 17.* it must be by rolls indented between the sheriff and the indictors, (which last statute extends also to leets and franchises,) otherwise the indictments are void; and one of the indictors must shew one part of the indenture to the justices, when they come to make deliverance.

3. By the statute of 1 *R. 3. cap. 4.* the indictors in the sheriff's *Turn* must have 20*s.* freehold, or 26*s. 8d.* copyhold, and be of good name, otherwise the sheriff or bailiff shall forfeit 40*s.* and the indictment is void.

(a) 2 *Co. Inst. p. 337.*

And therefore, if any be arraigned of felony upon such an indictment, he may plead that one of the indictors had not 20s. freehold, nor 26s. 8d. copyhold; so that when it is said *it shall be void*, it must be intended void by plea; for if the prisoner excepts not to it upon his arraignment, he is concluded by that omission.

Upon these indictments of felonies in the sheriff's *Turn*, tho they could not proceed to hear and determine them by reason of the statute of *Magna Charta*, cap. 17. yet the sheriff did commonly make out process or precepts in nature of *capias* to arrest the parties, as appears by the statute of *Westm.* 2. cap. 13.

But now by the statute of 1 E. 4. cap. 2. their power of making out process upon these indictments is taken away, as well in case of indictments of felony, as other misdemeanors within their cognizance; but they are to deliver all such presentments and indictments to the justices of the peace at their next sessions, who are [71] to make out process thereupon, and hear and determine them; but if the original presentment were not within the jurisdiction of the *Turn*, the justices of peace ought not to proceed upon such indictments, tho removed before them. 4 E. 4. 31. a. 8 E. 4. 5. b.

And what hath been said touching the *Turns* of sheriffs is in a great measure applicable to leets, namely they have power to receive indictments of felonies at common law, but not of felonies by act of parliament, unless specially limited to them.

The statutes of *Magna Charta*, cap. 17. 1 E. 3. cap. 17. extend to them as well as to *Turns*, but not the statute of 1 E. 4. and therefore they cannot hear and determine felonies presented in them, but must send their indictments of felonies to the justices of gaol-delivery there to be heard and determined, if the offenders are in custody, 8 H. 4. 18. a. *Franchise* 2. or remove by *certiorari* into the king's bench, that process may be made upon them to an outlawry.

And thus far concerning the ordinary jurisdiction, wherein felonies are inquired of, heard or determined; I have wholly omitted the courts in *eyre*, the courts of the *staple*, and the franchise of *infangthief* and *unfangthief*, because they are wholly disused, and the learning concerning them rather for curiosity and antiquity, than for use in this business of pleas of the crown. The jurisdiction also of the royal franchises of *Ely*, *Hexham* and *Hexhamshire*, and other particular franchises remaining excepted by the statute of 27 H. 8. cap.

cap. 24. are but particular jurisdictions, and not so useful for the pleas of the crown, as for a tract concerning the jurisdiction of courts.

And thus far touching the ordinary jurisdictions in cases capital.

See 1 Blackf. Com. ch. Introd. p. 116. ch. 9. 339. 4 Blackf. Com. ch. 21. pa. 292. ch. 33. p. 413. 428. ch. 19. p. 273. and Burn. Tit. Sheriff. per tot. and Index to 2 Hawk. P. C. Tit. Sheriff. Tit. Turn.

[72]

C H A P. X.

Concerning the apprehending or arresting of felons and traitors by private persons, and escapes.

HAVING in the foregoing chapters considered the several courts of ordinary jurisdiction, where traitors and felons are to be proceeded against, I shall now descend to the consideration of the means and method of bringing such offenders to trial, judgment, and execution.

And herein I shall observe this order, first to consider those courses, that are preliminary to their arraignment, and afterwards to consider of their arraignment, and those proceedings, that are subsequent thereunto, their trial, judgment, and execution.

Concerning the former, namely the courses preliminary to their arraignment, they are principally these, *viz.* 1. The arrest or apprehending of them. 2. Their imprisonment or commitment, and therein of bailing or discharging them before indictment. 3. Their indictment.

Touching the first of these, namely their arrests or apprehending them.

This is the first instance of their prosecution, and this is done either, 1. By private persons by virtue of the law, or 2. By officers or *virtute officii*, or 3. Upon hue and cry levied, or 4. By warrant or precept *virtute præcepti*.

But before I come to these I will consider something concerning escapes of felons, and what punishment lies upon *them* that permit it, which will open the consideration of what is every person's duty in this case; and by this escape I do not mean escapes suffered by sheriffs

riffs or gaolers, but escapes suffered by villis, townships, or private persons.

If there be a murder or manslaughter committed either in the day or night in an inclosed town, if the murderer be not [73] taken, the town or city shall be amerced upon a presentment thereof, either by the coroners or grand inquest before the justices of gaol-delivery. 3 E. 3. *Coron.* 299. But if it were a vill not inclosed; there if a murder were committed within the precinct of the vill, tho in the field, and the murderer not taken, if it were done in the night, the vill should not be amerced; but if it were in day-light, tho in the evening, the town should be amerced. 3 H. 7. *cap.* 1. 3 E. 3. *Coron.* 293.

And the same law is if the killing were by a man by misadventure, if he escapes and be not taken. 3 E. 3. *Coron.* 302. for tho by the statute of *Marlebr. cap.* 26. that common fine or amercement called *murdrum* (*) was not to be imposed in cases of death *per infortunium*, yet the amercement called *escapium* took place even in that case. *Vide Brañton, Lib.* III. *cap.* 15.

If the malefactor were taken by the township, and delivered to the sheriff or his bailiff, or to the gaoler of the county, and then an escape happen, the township is not chargeable, but the sheriff or bailiff. 3 E. 3. *Coron.* 337.

But if he be in guard of the constable, and the constable is bringing him to the gaol, yea tho the gaoler refused to take him, if he escapes, it is a charge upon the vill. 3 E. 3. *Coron.* 346. 10 H. 4. 7. a. *Escape* 8. *per Gascoigne*; nay, tho in the flight he be slain for necessity of retaking him because he resists, yet it is an escape upon the vill. 3 E. 3. *Coron.* 328.

And in case the vill be not sufficient to answer the amercement, the hundred shall be charged therewith, and in default of the hundred, the county; and if the killing be out of any vill, the hundred is amerceable for the escape. 8 E. 2. *Coron.* 425. *Stamf. P.C. Lib.* I. *cap.* 31. *f.* 34. *b.*

But this is only in case of felony touching the death of a man, for there the fact is apparent, that the man is slain; but in case of other felony, as theft, there tho the thief be not taken, no amercement lies upon the town, nor other penalty at common [74] law, but by the statute of *Winton, de quo infra*.

(*) *Vide Part I. p.* 39. 425. 447.

But if they had a felon in their custody, or in the custody of the constable, and he escape, the vill had been amerceable, and so is the hundred, if they have him in their custody, or in the custody of the constable of the hundred, and suffer him to escape. 3 E. 3. *Coron.* 316.

The law used in the time of H. 3. when *Bracton* wrote, appears *Lib. III. cap. 10.* to be thus: if a man had committed manslaughter either by misfortune or otherwise, if he fled, and the jury were inquired of by the judge if he were *in decennā*, then the *decenna* was to be amerced by the court, because they had him not there; if he were not in any *decenna*, then the vill was to be amerced; because they received him an inhabitant, and had him not *in franco plegio*; for every one above twelve years old ought to be in frank-pledge, except clergymen, noblemen, and knights and their families (*): and therefore in the case of clergymen, noblemen and knights, if any of their family *de manupastu* committed a murder or manslaughter, the clergyman, nobleman or knight was amerced if the malefactor fled, unless some special custom had abrogated it, as in *Hertfordshire*: and thus did the practice long after continue: *vide* 8 E. 2. *Coron.* 428. *Si serviens aliqujus domini in servitio suo existens facit feloniam & convincatur, quamvis post feloniam ipsius non receptavit, amerciandus est*; and 3 E. 3. *Itin. North'ton, Coron.* 203. It was presented, that *A.* had killed *B.* and it was demanded of the presenters, whether he were *in decennā*? They answered, *He was not*? Then it was demanded where he abode? They say with the parson of the town; and thereupon the parson was amerced for his *manupast*. Then it was demanded who was present when he flew him? They say *C.* It was then demanded of them, whether *C.* received him [took him]? They say *Not*; wherefore *C.* was amerced. Then it was demanded where the felon was? They say *he is escaped*; then it was demanded whether it were done in the day or the night? They answer *in the evening*; therefore the whole vill was amerced.

[75] Several things are observable in this case. 1. That if he had been *in decennā*, the *decenna* had been amerced, because they had not him present *ad standum recto in curiā*. 2. That because the parson nor his family were not by law to come to the view of frank-pledge, he was amerced for one that was of his family, one *de manupastu*. 3. That he that was present and took not the offender,

(*) *Vide Part I. p. 65. in notis.*

was also amerced. 4. That because the felony was committed in the day-time, and the felon escaped, the whole vill was amerced, 22 *E.* 3. *Coron.* 238. so in effect three amercements for one escape.

And *note*, that according to *Bracton, ubi supra*, he is *de manupastu, qui est ad victum & vestitum*, or *ad victum cum mercede*, as a household servant; and according to the antient law, he that entertained a man three nights, made him to be *de manupastu*.

This law of amercing the *decenna*, or him of whose family an offender is, is not abrogated, but yet it is not now used; but it was certainly a most excellent constitution, whereby every man was under the pledge of his master or father, with whom he lived, or must be within some *decenna* that may see him forthcoming: *vide Spelman in Glossar. Titul. Friburg & Leges Edvardi, cap. 19. 20. (a).*

As thus the vill is answerable for an escape, so is he that is present when a manslaughter or murder is committed, and doth not do his best endeavour to apprehend the malefactor, though he were not party or accessory to the crime; with this agrees 8 *E.* 2. *Coron.* 428. before-mentioned, where it is called only an amercement; but 8 *E.* 2. *Coron.* 395. he that was of full age, that was present when a manslaughter was committed, *et ne leva le maine d' attach le felon*, was committed to prison, till he made fine to the king, but he that was within age was discharged (*b*).

And tho in the book of 14 *H.* 7. 31. *b.* a person indicted for being present at a felony, without saying he was aiding and abetting, was discharged, it was because the indictment there was with intent to make him a felon, and not to charge him with a misdemeanor for not pursuing the felon: *vide Co. P. C. p. 117.* It is a misdemeanor, for which the party shall be fined and imprisoned. [76]

By that which hath been said, it appears, that the apprehending of a felon is in many cases a duty, and not arbitrary, even in cases of a private person, without any other warrant than what the law gives, and that the omission thereof is a misdemeanor, and punishable by fine or amercement.

And now therefore I come to consider touching the arrests by a private person in case of felony.

And this is of these kinds. 1. Where the party arrested hath really committed a felony, and this is known to the party arresting. 2. Where the party arrested hath really committed a felony, but it is only

(a) *Wilk. Leg. Anglo-Sax. p. 201.*

(b) *Vide Part I. p. 21.*

suspected, and not certainly known to the party arresting. 3. Where there hath been a felony committed, and the party arresting doth, upon probable grounds, suspect the person arrested to have committed it, tho in truth he did it not.

I. As to the first of these, where a person hath committed felony, and *A.* knows it.

It is true in this case, if the time and nature of the fact, and the condition of things will bear it, it is best to complain to a justice of peace, and have his warrant for the apprehending of him; or if that cannot be had in convenient time, then to call to his assistance the constable; but such the case may be, that the delay that must arise necessarily by these solemnities, may give the felon opportunity to escape; and therefore in this case *A.* without any other authority than what the law gives him, may arrest or apprehend the felon; and if he cannot do it by his own strength, he may call others to his assistance, or raise hue and cry for his apprehension; and if he doth not thus, he is punishable, as is above declared, if it can appear that he knew it.

And it will be all one, whether the felony were committed in the same county, or in any other county; for the law in this case makes *A.* an officer; and this was antiently the law, and still is. *Braeton Lib. ult. in fine, in criminalibus causis, ubi sequi debet capitale supplici-*

[77] *um, vita videlicet vel mutilatio membrorum, non sequitur attachiammentum aliquod, sed corpus talis, quicumque ille fuerit, ab omnibus arrestetur, qui sunt ad fidem domini regis, sive inde præceptum habuerit, sive non habuerit;* and accordingly it is ruled, 10 *E.* 4. 17. *b.* that it is a good justification for a man in an action of false imprisonment to say, that the plaintiff committed a felony, and shew what, and the defendant arrested him, and delivered him to the constable, or he might have brought him to gaol by himself or his servant, as is there agreed.

But the safer way is, to bring him before a justice of peace, who may examine and commit him.

And as a private man may do thus upon a felony committed, so if he see danger of murder by a dangerous wound given, he may pursue the offender. 7 *E.* 3. 16. *Barre* 291.

And in both these cases, he may break open doors, if he be denied entrance, and if *de facto* the felon or malefactor be there, for the law makes him an officer in this case, as well as if he were a justice of peace or constable. 7 *E.* 3. 16. *b.*

Nay

Nay yet farther, if the felon resists or flies, so that he cannot be taken without killing him, this is justifiable, and no felony; but still it must be where he cannot be otherwise taken, for it is for advancement of justice, and suppression of felons, and therefore if they cannot be otherwise apprehended, it is lawful, as well as if *A.* were a constable, or had a warrant; and if the books that speak of this matter, be but carefully examined, it will appear that the law was so generally taken, tho he were pursued or taken without any formal process to the sheriff, and that as well before an arrest made, as after; and this appears *in terminis*, 22 *Affiz.* 55. 3 *E. 3. Coron.* 346, & 328, & 290. but indeed the books of 3 *E. 3. Coron.* 288, 289. are of a constable and watchman: but in 3 *E. 3. Coron.* 349. the townsmen that did it were fined 40s. but it seems it was more for the escape than the killing: *vide Stamf. P. C. Lib. I. cap. 6. f. 13. a. b. accordant.*

As to the statutes of *Magna Charta*, *cap. 29.* 25 *E. 3. cap. 4.* 28 *E. 3. cap. 3.* 42 *E. 3. cap. 3.* they do not at all concern this preparatory imprisonment of a felon, as shall be shewn in due time; [78] and therefore whatsoever hath been before said holds true in the first instance of his imprisonment, tho the party be not yet indicted.

II. As to the second case, *viz.* where a felony is committed by *B.* but *A.* that arrests him, doth not certainly know it, as not being present at the committing of it.

I take the law to be all one with the former case, only what he doth herein, he doth at his peril; for if in truth *B.* be a felon, then *A.* may arrest him, and may break a house to arrest him, if he be within the house, and refuses to render himself; yea, and if he will not suffer himself to be taken, he may in case of necessity be killed; but this still is at the peril of *A.* for if he be no felon, it may be manslaughter at least in *A.* if he doth it.

But how far forth this will be justifiable in case that *A.* hath a good cause of suspicion, will be considerable in the next enquiries.

III. The third case is, there is a felony committed, but whether committed by *B.* or not, *non constat*, and therefore we will suppose, that in truth it were not committed by *B.* but by some person else, yet *A.* hath probable causes to suspect *B.* to be the felon, and accordingly doth arrest him; this arrest is lawful and justifiable, and the reason is, because if a person should be punished by an action of trespass, or false imprisonment for an arrest of a man for felony under these cir-

cumstances, malefactors would escape to the common detriment of the people.

But to make good such a justification of imprisonment, 1. There must be in fact a felony committed by some person; for were there no felony, there can be ground of suspicion. Again, 2. The party, (if a private person), that arrests, must suspect *B.* to be the felon. 3. He must have reasonable causes of such suspicion, and these must be alledged and proved.

1. There must be a felony done; and therefore if a man be taken for suspicion of felony, and delivered to the constable, or remains in the custody of him that took him, yet if in truth no felony were committed, he may be let go at large, and no punishment shall ensue for the escape. *Kelw.* 34. *a. b.* But if a felony were committed, [79] though he that is taken for the suspicion thereof be in truth innocent, and it so appears to the constable, or him that arrests him; yet if he let him go before he be indicted, and acquitted or delivered by proclamation before the justices of gaol-delivery, the party letting him go shall be punished for an escape. 44 *Affiz.* 12. *Poulton de Pace*, *f.* 146. *b.* 5 *H.* 7. 4. 7. *H.* 4. 35. *a.*

2. The party that arrests him, must be he that suspects him, and regularly it cannot be done by another; and therefore if a man justifies in false imprisonment for suspicion, he must justify it as his own act, and not by the command of the sheriff or other officer, nor can another justify by the command of him that so suspects. 11 *E.* 4. 4. *b.*

But this doth not always hold true; for an officer of justice, may, in assistance of him that suspects, justify the imprisonment; as a constable, upon a complaint made to him by him that suspects, may justify; but he must allege his justification in the same manner as he that suspected ought, *viz.* a felony done and cause of suspicion; and therefore the party suspecting and desiring the constable's assistance must acquaint him with the whole matter, and the causes of his suspicion, otherwise he is not bound to assist him. 2 *H.* 7. 15. *b.* And in like manner a justice of peace being applied to by him that suspects and acquainted with the whole circumstances of the case (*).

And this appears beyond dispute even by the statute of 34 *E.* 3. *cap.* 1. whereby power is given to the justices of peace to arrest all those whom they find by indictment or by suspicion, and to put them in prison.

(*) *Vide Part I. p. 580.*

And the reason is apparent, namely, the justices of peace are made judges of the reasonableness of the suspicion, and when they have examined the party accusing touching the reasons of their suspicion, if they find the causes of suspicion to be reasonable, it is now become the justice's suspicion as well as theirs, and accordingly adjudged, *P. 43 Eliz. C. B. Croke, n. 35. Tatam's case (c)*, and therefore the saying of my lord *Coke*, 4 *Instit. p. 177.* "That notwithstanding such warrant, or the aid of the constable upon such complaint, [80] it is still the party's arrest, and not the constable's or justice's, and that he must be present, and that he cannot break open a door by virtue of such warrant," is neither warranted by the law nor the common practice (*); and in the book of 2 *H. 7. 15. b.* where one justified in aid of the constable upon a felony done, and a suspicion and cause thereof, *ut infra*, it was ruled a good justification against the opinion of *Bryan*; and it is apparent by the statute of 5 *E. 3. cap. 14.* "If any person hath any evil suspicion of persons to be robberds-men, wasters or draw-latches, they shall be incontinently arrested by the constables of the town, be it by day or night; and if they be arrested within franchises, they shall be delivered to the bailiff of the franchise; if in the gildable, to the sheriff, and kept in prison till the coming of the justices."

The suspicion may be by any person, yet the imprisonment must be by the constable; and the reason is that which is given before, because the constable is a proper officer, to whom complaints of this nature may be made.

And therefore if a felony be committed upon the goods of *A.* and the goods be found in the custody of *B.* and *A.* comes to a constable and shews him the case, and requires him to bring him before a justice; this is a good justification by *A.* in false imprisonment brought against him without so much as an averment, that he suspected him. *H. 4. Car. Rot. 513. Marbery and Porter, B. R. vide 2 E. 4. 8. b.*

But it is true, that he that is not an officer cannot justify by the command of him that suspects, if he also be no officer; and so are the books of 5 *H. 7. 5. a. per Cur'*. 12 *Co. Rep. 92.* Sir *Antony Ashley's case*, 11 *E. 4. 4. b.*

But then the case is easily solved, for if a felony be committed, and *A.* hath probable cause to suspect *B.* and accordingly suspects *B.* and acquaints *C.* with the whole matter, *C.* upon this having probable

(c) *Cro. Eliz. p. 829.*

(*) *Vide Part. I. p. 579.*

cause to suspect *B.* tho he cannot justify the imprisonment of *B.* as by the command of *A.* that first suspected him, he may justify by his own suspicion; and the like of him that comes in aid of *A.* to arrest *B.* 5 *H.* 7. 4 & 5.

[81] 3. The third thing to be observed in this arrest by a private person upon suspicion is, that he hath a probable cause of suspicion.

And these probable causes are very many, as for instance common fame, 5 *H.* 7. 4. *b.* 2 *H.* 7. 15. *b.* 11 *E.* 4. 4. *b.* &c. hue and cry levied, 21 *H.* 7. 28. hath part of the goods found upon him, or be indicted of the like, 12 *Co. Rep.* 92. *Ashley's* case, party with him that committed the robbery. 7 *E.* 4. 20. *a.*

And note, that the law hath that care, that malefactors, tho but suspected, should be apprehended, that a man may alledge twenty causes of suspicion, and it shall not make his plea double, for one answer makes an issue upon the whole, viz. *de injuriâ suâ propriâ absque tali causâ*, and no issue shall be singly taken upon one cause of suspicion, where many causes are thus alledged. 2 *E.* 4. 8 & 9. 7 *E.* 4. 20. *a.*

Now what is to be done by a private person, that thus arrests a party upon suspicion of felony; if after such an arrest the party arresting discharge him without bringing him to a justice or constable, he shall be punished for the escape at the king's suit, but it makes not the imprisonment unlawful as to the party. 10 *E.* 4. 17. *b.*

Or he may carry him to the gaol, and if the gaoler receive him, he that made the arrest is discharged, 10 *E.* 4. 18. *a.* but he must not carry him to a gaol of any other county than where he is taken, unless either there be no gaol in the county, or that he cannot for the danger of rebels bring him to that gaol. 11 *E.* 4. 4.

Or he may deliver him to the constable of the vill, and that is a sufficient discharge, 10 *E.* 4. 17, *b.*

But the proper way is to bring him to a justice of peace, who may commit, or discharge, or bail him, as the case requires.

Yet if the party so arrested be sick and cannot be removed without danger of death, he may detain him in his own house, till he can reasonably bring him to a justice or officer, 2 *E.* 4. 8. *b.*

[82] The arrest of a man upon suspicion of felony by a private person is, as before is said, a thing permitted by law and therefore justifiable; but it is not a thing commanded by law, neither

is the party punishable, if he omit it, as in case where it is a known felony, or where done upon hue and cry levied, or by an officer, or by a precept; for no man is judge of a man's suspicion but himself (*).

And therefore there is not the same privilege in all points allowed to him that arrests upon suspicion, as to him that arrests upon hue and cry, or by warrant, or where he is present at the felony committed, and so knows it.

1. It seems he that arrests as a private man barely upon suspicion of felony, cannot justify the breaking open of doors to arrest the party suspected, but he doth it at his peril, *viz.* if in truth he be a felon, then it is justifiable, but if he be innocent, but upon a reasonable cause suspected, it is not justifiable, 4 *Co. Instit.* p. 177, 178. (but yet to prevent a murder or manslaughter a private person may break open a door, 12 *H.* 8. 2. *b.*) but he may enter by the doors open, and make the arrest in the house.

But *note*, that in all arrests he must acquaint the party with the cause of his arrest.

But in case of a known felony done by the party, or where a felony is done, and a constable comes and demands entrance upon a complaint to him, or by a justice of peace's warrant, or upon hue and cry; there the doors may be broken open upon notice and demand of entrance and refusal.

2. Again, if there be a felony committed by *B.* and *A.* is present and sees it, and pursues the felon, and he cannot be otherwise taken, and *A.* kills him in the pursuit, tho he have not arrested him, the law justifies him; and possibly the same law may be in case of an officer, a warrant, or hue and cry, tho the person be not guilty of the fact, if he refuses to submit to the arrest; but *de hoc infra*.

But if a felony be committed, and *A.* upon probable cause suspects *B.* to have been the felon, tho the law permits him to arrest *B.* tho in truth innocent, yet he cannot justify the killing of him upon his flight and refusing to submit, *justiciari se permittere nolens*; [83] but if he kills him, it is at his peril; for if *B.* be innocent, it is at least manslaughter, *Co. P. C.* p. 56. 221. 22 *Affiz.* 55. and the reason is, because *B.* is not bound to take notice of *A.* as authorized to arrest him, as being no officer, nor having any warrant; it is true, a constable arresting in the king's name, or offering so to do, the party is

(*) *Vide Part I. p. 490.*

bound to take notice and submit, as hath been said, *Part I. cap. 37.* but a mere stranger offering to do it, a man is not bound to take notice of his authority, and therefore may fly from him if innocent, for possibly he may think he came to rob him.

3. Yet farther, if an innocent person be actually arrested upon suspicion by a private person, all circumstances being duly observed, and he breaks away from the arrest, yet I do not think the person arresting can kill him, tho he cannot be otherwise taken, for the person arrested is not bound to take notice of that authority that the law gives to a private person in this case.

But then can he justify the beating or striking of him in case he cannot otherwise take him that thus makes the assault? As where a bailiff of the sheriff by warrant arresteth a person, tho he cannot strike or beat him before the arrest to take him; yet after the arrest and escape such bailiff may justify his beating, if he cannot otherwise retake him according to the opinion of the book, *2 E. 4. 6. b.*

And it seems he cannot, but only lay his hands gently upon him to lay hold of him for the reason before given.

4. But then suppose that either before the arrest or after the arrest, *B.* draws his sword and assaults *A.* and *A.* presseth upon him either to take or detain him, and in the conflict *B.* kills *A.* is it murder in *B.* or if *A.* kills *B.* is it justifiable and no felony in *A.*?

If the bailiff of a sheriff is about to take a prisoner, and before he takes him the party draws his sword and kills him, this is murder, as is before said, *Part I. cap. 37.* And on the other side, if either after or before the arrest the bailiff upon assault made upon him kills the
 [84] party, this is no felony, neither is he bound to give back to the wall. *Co. P. C. p. 56 & 221.*

It seems, that if the party arrested kills him that thus arrests upon suspicion, always supposed the party killing is innocent,) this is but manslaughter and not murder; and on the other side, if the party arresting kills the party arrested or intended to be arrested by him upon suspicion, that this is manslaughter; and tho the arrest in this case had been lawful, yet the party arresting hath not the same privilege, as in case of killing a man upon hue and cry, tho the party arrested after the arrest, or upon the attempt of the arrest, assaulted him that arrested him or attempted to arrest him. 1. Because in this case, tho the law impowers the party to arrest him, yet it is but a power of permission, not an injunction by the law, neither is he punishable if he had

had not made such an arrest; and so not like the case of an arrest by an officer, warrant of a justice, hue and cry, where it is a duty to arrest, and the party, that omits his duty in this case, is punishable by fine and imprisonment for his omission. 2. Because he might have had a legal warrant from a justice of peace, or called an officer to his assistance, and then he had been under a more effectual protection of the law in what he did in pursuance of his duty. 3. It would give too great a latitude for persons to be their own judges in this case, and to take away a man's life who is innocent, and possibly might not have sufficient assurance, that either a felony had been committed, or that he that arrests had a just or lawful cause of suspicion.

And it seems the law is the same, whatsoever the cause of suspicion were, yea altho the person were indicted for the offence, because a person innocent may be indicted, and because there is another way to bring him into an answer, namely process of *capias* to the sheriff, who is a known responsible officer. 3 *E.* 3. *Coron.* 346.

And thus far concerning arresting by a private person upon suspicion.

See Burn. Tit. Arrest per tot. & Index to 2 Hawk. P. C. tit. Arrest. Foster. 136. 319. 320. and 4 Blacks. Com. ch. 21. of Arrests. pa. 289, &c.

C H A P. XI. [85]

Concerning arrests or apprehension of felons, or persons suspected of felony by an officer.

THERE are certain officers and ministers of public justice, that *virtute officii* are empowered by law to arrest felons, or those that are suspected of felony, and that before conviction, and also before indictment.

And these are under a greater protection of the law in execution of this part of their office upon these two accounts. 1. Because they are persons more eminently trusted by the law, as in many other acts incident to their office, so in this. 2. Because they are by law punishable, if they neglect their duty in it.

And therefore it is all the reason that can be, that they should have the greatest protection and encouragement in the due execution of their

their office, since their actings herein are not arbitrary but necessary duties, (not permissions,) and under severe punishments in their neglect thereof.

And hence it is, that these officers, that are thus intrusted, may without any other warrant but from themselves arrest felons, and those that are probably suspected of felonies; and if they be assaulted and killed in the execution of their office, it is murder; and, on the other side, if persons that are pursued by these officers for felony or the just suspicion thereof, nay for breach of the peace or just suspicion thereof, as night-walkers, persons unduly armed, shall not yield themselves to these officers, but shall either resist or fly before they are apprehended, or being apprehended shall rescue themselves and resist or fly so that they cannot be otherwise apprehended, and are upon necessity slain therein, because they cannot be otherwise taken, it is no felony [86] in these officers or their assistants, that upon inevitable necessity kill them, tho possibly the parties killed are innocent, for by their resistance against the authority of the king in his officers, they draw their own blood upon themselves.

The officers that I herein principally intend are, 1. Justices of the peace. 2. Sheriffs. 3. Coroners. 4. Constables. 5. Watchmen. And when I mention these I also include all, that come in their aid and assistance; for every man in such cases is bound to be aiding and assisting to these officers upon their charge and summons, in preserving the peace and apprehending of malefactors, especially felons.

And if any being thereunto called shall not give their assistance, they are to be punished by fine and imprisonment, and consequently are under the common protection of the law equally with the officers themselves.

And that was the reason of the statutes of 7 *Jac. cap. 5* and 21 *Jac. cap. 12.* that gave power as well to assistants of the most usual peace-officers, as to the officers themselves, to plead the general issue, and give the special matter of their justification in evidence, and allow double costs to the defendant.

Wheresoever a private person may arrest a felon or person suspected, there any of these officers may do it; but of this sufficient hath been said before: I therefore come to that power, that concerns them specially as officers in this case.

I. *Justices of peace* have a double power as in relation to arrest of felons; one upon complaint of another person, whereof hereafter, *cap.* 13. Another primitive and original in themselves, whereof at present.

If a justice of peace see a felony, or other breach of the peace, committed in his presence, he may in his own person apprehend the felon.

And so he may by word command any person to apprehend him, and such command is a good warrant without writing; but if the felony or other breach of the peace be done in his absence, then he must issue his warrant in writing under his seal to apprehend the malefactor, 14 *H.* 7. 9. *b.* adjudged; and by *Fineux*, if there be any riot or breach of the peace like to happen by a tumultuous meeting, &c. he may command his servants or others to prevent it by arresting the parties. [87]

And *note*, that if the justice of peace hath either from himself or by a credible information from others knowledge of a felony done, and just cause of suspicion of any person, he may himself arrest and commit that person, 14 *H.* 7. 8. *per Keble*; and according to it are the express words of the statute of 34 *E.* 3. *cap.* 1. before-mentiond.

II. Secondly, As to the *sheriff*, it is ordaind by the statute of *Westminst.* 1. *cap.* 9. (*a*), “ That all generally be ready and appointed at the commandment and summons of the sheriff, and at the cry of the country to sue and arrest felons, when any need shall be, as well within franchises as without, and they that will not so do, and thereof be attaint, shall make grievous fine to the king, and if default be found in the lord of the franchise, the king shall take the franchise to himself, &c. And if the sheriff, coroner, or bailiff, will not attach or arrest such felons there, as they may, or will not do their office for favour borne, to such misdoers, and be attaint, they shall have a year’s imprisonment and after make grievous fine, if they have wherewith, and if not three years imprisonment.

By this statute the sheriff is not only enabled but enjoined to arrest felons, and all persons are required to be assisting to him therein upon his summons; and they are punishable by fine and imprisonment in default thereof.

(a) 2 *Co. Instit.* p. 172.

And altho the slieriff in his *Turn* had power to take presentments of felonies at common law, yet this was not intended barely of issuing precepts upon such inquisitions, but to a ministerial taking of felons as he was conservator of the peace, for his *Turn* was kept but twice in the year, but the occasions of taking felons were frequent.

And accordingly it was practised, *vide* 5 *H.* 7. 5. *a.* in *fine*, the slieriff arrested one suspected of felony, and no question of the lawfulness thereof.

[88] III. *Coroners*: Tho coroners had no power of taking inquisitions of any felony but the death of a man, as hath been shewn; and therefore by the expresse provision of the statute of 4 *E.* 1. *De officio coronatoris* he may not only make process but make hue and cry after them, yet by the statute of *Westminst.* 1. *cap.* 9. above-mentiond he is a conservator of the peace in relation to all felonies, and can command them to be apprehended, tho he can take no inquisition concerning any but the death of a man.

IV. For the office of *constable* it is of twofold extent. 1. Ministerial and relative to the justices of peace, coroners, slieriffs, &c. whose precepts he ought to execute, or in default thereof he may be indicted and fined. 2. Original or primitive, as he is a conservator of the peace at common law.

By the original and inherent power in the constable he may for breach of the peace and some misdemeanors, less than felony, imprison a person.

If a man leaves an infant in the cold to the intent to destroy it, or charge the parish, the constable may take him and put him in the stocks. *M.* 34 & 35 *Eliz.* *B. R.* *Croke*, *n.* 1. *Beal* and *Charter*, *p.* 287.

So if a constable be assaulted by *A.* tho it be in his own case, he may imprison the party and carry him to gaol; but for opprobrious words, or a general hindrance of him to summon the trained bands to attend the lord mayor of *London* upon his precept, he cannot justify the imprisoning of a person in the *Compter*, *T.* 31 *Eliz.* *Rot.* 1521. *Fulwood* and *Gascoign* (*e*); but he must bring him to a justice of peace: *nota*, in the justification it was also adjudged, that he assaulted him: *ideo quære* of that judgment.

And what may be done by a constable may be done by his deputy, for by the law a constable may make a deputy, and he is within the statute of 7 *Jac. cap. 5.* to plead the general issue. *M. 13 Jac. B. R. Phelps and Winchcombe (d).*

If *A.* menace *B.* to kill him, upon complaint thereof to the constable he may arrest him and put him into the stocks, till he find surety of the peace, 44 *E. 3. Barre 202.* but that is [89] intended, that he may detain him till he can conveniently bring him to a justice of peace and to avoid the present danger, for tho some of the old books seem to hold, that the constable may take sureties of the peace and detain a person till he gives him sureties, yet it cannot be by recognizance but by bond, and that for an affray or menace of breach of the peace done in his view. *H. 37 Eliz. B. R. Croke, n. 25. Sharrock and Hammer (e).*

If information be given to a constable, that a man and woman are in incontinency together, he may take the neighbours and arrest them, and commit them to prison to find sureties for their good behaviour, 1 *H. 7. 6. a.* there the custom of *London* indeed is pleaded; but 13 *H. 7. 10. b.* adjudged, that it is a good justification for the constable or any in assistance to plead, that *A.* holds a messuage in the same vill, and she kept persons suspected of common bawdry, and the plaintiff suspiciously resorted to that house with women of ill fame, and that he arrested the plaintiff to find sureties for the good behaviour.

The constable may arrest suspicious night walkers (*f*) by the statute of 5 *E. 3. cap. 14.* and men that ride armed in fair or markets or elsewhere. *Stat. 2 E. 3. cap. 3. de Northampton.*

And it appears by the books before-mentioned, that in cases of arrests of this or the like nature, the constable may execute his office upon information and request of others, that suspect and charge the

(*d*) *Moor p. 845.*

(*e*) *Cro. Eliz. p. 375.*

(*f*) But then that suspicion must not be a mere causeless suspicion, but must be founded upon some probable reason; and so it was ruled in the case of the Queen and *Tooley, Mich. 1709.* for the murder of *Dent*, who was kild in aiding the constable, who had taken up a woman, that was walking the street upon suspicion, as being a woman of ill fame. *C. J. Holt* delivered the resolution of the court, that it was not murder, and gave this for one reason,

“ That it was not lawful even for a legal
“ constable to take up a woman upon a
“ bare suspicion only, having been guilty
“ of no breach of the peace nor any un-
“ lawful act: and as to the case in 13 *H. 7.*
“ 10. the reason thereof was, because it
“ was in the view of the constable, who
“ found her misdoing; that of late, con-
“ stables made a practice of taking up
“ people only for walking the streets, but
“ he knew not whence they had such an
“ authority. *MS. Rep.*

offenders, nay tho it be but with suspicion thereof. 5 E. 3. cap. 14. 13 H. 7. 10. b. 44 E. 3. Barre 202.

But if there be an affray, tho to prevent it, or in the time of the affray the constable may upon information or complaint arrest the offender, yet it is held, that if the affray be past, and no danger of death, the constable cannot arrest the parties without a warrant from a justice of peace. 38 E. 3. B. *Faux Imprisonment* 6.

But the law seems contrary, for tho in that case he cannot take surety of the peace himself, yet upon a complaint to him he may arrest the party to bring him before a justice to find surety of the peace, or for appearance. 44 E. 3. Barre 202. 35 Eliz. *Sharrock's case*.

Now as touching the constable's power of arresting *ex officio* in relation to felonies it may come under these considerations, 1. What his power is to arrest when a felony is *certainly* committed. 2. What his power is to arrest in cases of *suspicion* of felony. 3. What his power is in case of *danger* of felony, tho none be committed, as in case of affrays or dangerous wounding.

1. As to the first of these, where a felony is committed, it is of all hands agreed, that he may *ex officio* arrest and imprison the felon till he can conveniently be conveyed to a justice of peace or the common gaol.

And it will be all one, whether the felony were committed in the same vill, or in any other vill or county, if the felons be within the vill where he is constable.

And this appears clearly by the books of 2 H. 7. 15 b. 7 E. 4. 20. a. and divers others, and by the statute of *Westm.* 1. cap. 9. 5 E. 3. cap. 14.

And in that case it is on all hands agreed.

1. That he may break open doors to take the felon, if the felon be in the house, and his entry denied after demand and notice that he is constable.

2. That if in such an attempt of arrest the constable or any that come in his assistance be kild after competent notice that he is constable, it is murder.

3. That if the felon resist and cannot be taken, whether [91] it be after the arrest or before, the killing of the felon, who cannot be otherwise taken, is no felony.

And the reason of all this is, because he is *ex officio* a conservator of the peace, and is not only permitted but by law enjoined to take a felon,

felon, and if he omits his duty herein, he is indictable and subject to a fine and imprisonment.

And it is not material, whether he saw the felony committed, or hath it only by complaint or information; for as well in one case as the other he is bound to apprehend the felon, and make search after him within the limits of his jurisdiction, and to raise *hue* and *cry* upon him; and certainly what may be done upon *hue* and *cry* raised upon a felon may be done by that constable who upon the first complaint raiseth it; and the law gives him protection in the execution of his office, and will never punish him in the necessary pursuit of what it enjoins him.

And with this all the before cited books in the precedent chapter do agree; for I have before therein determin'd, that in this case a private person may kill a felon, who is really such, if he cannot otherwise be taken; *vide supra*, p. 77.

2. I come to the *second*, namely what if there be a felony done, (suppose a robbery upon *A.*) and *A.* suspects *B.* upon probable grounds to be the felon, and acquaints the constable with it, and desires his aid to apprehend him; in this case I say,

1. That the constable may apprehend *B.* upon this account, tho the suspicion arise in *A.* at first; and with this agree the statutes of 3 *E.* 1. cap. 9. and 5 *E.* 3. cap. 14. and the books of 2 *E.* 4. 9. a. 5 *Co. Rep.* 91. b. *Semain's case*, *Dalt. cap.* 109. p. 292. (g), 13 *E.* 4. 9. a. accords 2 *H.* 7. 15. b. tho *Brian* be to the contrary; but there are to be these circumstances to accompany it, 1. *A.* the person suspecting ought to be present, for the justification is, that he did aid *A.* in taking the party suspected, 2 *H.* 7. 15. b. He ought to inquire and examine the circumstances and causes of the suspicion of *A.* which tho he cannot do it upon oath, yet such an information may carry over the suspicion even to the constable, whereby [92] it may become his suspicion as well as the suspicion of *A.* And if the constable should not be allow'd this latitude in cases of this nature, many felons would escape, and the party arrested hath no prejudice thereby, for the justice of the peace, to whom in such cases he is properly to be brought, may consider the circumstances, and possibly in some cases discharge or bail him, and upon his trial, if innocent, he will be discharged. 3. But there must be a felony in fact

done, and the constable must be ascertained of *that*, and aver it in his plea, and it is issuable.

2. Consequently, if the constable upon such an arrest or attempt thereof be kild, it is murder as well as in the former case.

3. That in such case, if the supposed offender fly and take house, and the door will not be opened upon demand of the constable and notification of his business, the constable may break open the door, tho he have no warrant. 13 E. 4. 9. a. for it is a proceeding for the king by persons by law authorized, and therefore there is virtually a *non omittas* in the actings of their authority.

And the reason of the difference between private persons arresting upon suspicion and constables is, 1. Because that in the former case it is but a thing permitted to private persons to arrest for suspicion, and they are not punishable if they omit it, and therefore they cannot break open doors; but in case of a constable he is punishable if he omits it upon complaint. 2. Because it would be a great inconvenience if every private man upon pretence of suspicion should break open houses, for they may not be of known value or responsible; but a constable is an officer known within the vill, and his authority known, and is presumed of sufficiency, for he is chosen by the leet, like a bailiff *jurus & conus*, who need not shew his warrant (*).

Again it seems to me, that if a person thus charged with suspicion of felony upon just grounds of suspicion, and where a felony is actually committed, tho he be innocent, yet if he resist the officer
[93] after notice that he is the officer, and assault him, if the officer kill him, it is no murder.

But it may be more questionable, whether if he fly and cannot be apprehended, the officer may kill him, where he is suspected and innocent, if he cannot be otherwise taken, as he may a felon, as before is shewn, p. 77. but it seems he may, and it is no felony no more than in the former case, for these reasons, 1. Because the constable is obliged to do his office in case of a probable suspicion, as well as in case of an actual felony. 2. Because he cannot judge, whether the party be guilty or not, till he comes to his trial, which cannot be till he be apprehended. 3. Because the party draws upon himself this inconvenience, and makes himself suspected by his very flight from the known officer.

(*) *Vide Part I. p. 461.*

And this is the reason why, tho a man be innocent of a felony committed, yet if he fled for it, and *that* be presented by the coroner, or found by the jury *that* acquits him of the felony, yet he forfeits his goods, because it was his own fault that he did not *stare juri*, and brought upon himself the just cause of suspicion, and put the country to trouble and hazard in pursuing him.

And yet it is true, that if the felon were not once in the hands of an officer that had warrant to arrest, as if he be in the house, and fly out at a back-door before the officer seizeth him, this is not an escape in the officer, 27 *Affiz.* 9. But on the other side it may be said, that it is nevertheless an escape in the township, for which they shall be amerced, tho the person were never actually taken; *quod vide supra, cap. 10.*

And therefore it is at the peril of the whole vill, if they take not a felon (*), and when he is upon probable cause suspected, he is presumed to be such, till the contrary appear upon his trial.

And therefore, as before is said, a justice of peace cannot discharge a person brought before him but for suspicion of felony, in case a felony were committed, but must either bail or commit him.

And upon the reason before given it seems, that if a per-
son be charged to the constable for felony, or suspicion of [94]
felony in the county of *A.* and the constable charge him in the king's name to yield himself, and he either before or after the arrest pursue him into another vill, nay into another county, the constable hath the same privilege and protection upon his pursuit and arrest, as if he were taken in the county of *A.* tho yet he must bring him before the justice of that county where he was taken: *vide Crompton de Pace, p. 172, 173. Dalt. p. 340. (h).*

But for this latter case I take the law to be all one in case of a constable having a warrant to arrest a felon, or not having one, but doing it by his own intrinsic power *virtute officii*, namely, that if he hath or hath not a warrant from a justice of peace to arrest a felon, if the felon fly into another county before arrest, he is to be brought before a justice of that county, or to the gaol of that county, where he is arrested; but if he were once arrested and escape, and upon fresh suit he is taken by the constable in another county, yet he may

(*) This holds only as to felony touching the death of a man, but not in case of other felony, as theft, &c. *vide supra,*

p. 73.

(h) *New Edit. p. 534.*

be brought back to the justice, or gaol of that county where he was first arrested (*); for in that case in supposition of law he is always in custody by force and authority of the first arrest, as well where the arrest was *virtute officii*, as where done by a warrant. *Vide* 2 E. 4. 6. b. 13 E. 4. 8. b.

And thus far touching the second case.

3. The *third* case is, where a felony is not yet committed, but in danger to be committed.

If *A.* hath wounded *B.* so that he is in danger of death, and *A.* flies and takes his house, and shuts the doors, and will not open them, the constable of the vill where it is done, or upon hue and cry, may break the doors of the house to take him, if upon demand he will not yield himself to the constable. 7 E. 3. 16. b. *Barre* 291.

And in that case, if the constable be kild, it is murder; if he kill *A.* if he cannot be otherwise taken, it is no felony, but excusable and justifiable by the necessity caused by the obstinacy and default of *A.*

[95] If there be an affray in the house, where the doors are shut, whereby there is likely to be manslaughter or bloodshed committed, the constable of the vill having notice thereof, and demanding entrance, if they *within* refuse to do it, but continue the affray, the constable may break open the doors to keep the peace and prevent the danger.

Nay yet farther, if there be disorderly drinking or noise in an house at an unseasonable time of night, especially in inns, taverns, or alehouses, the constable or his watch demanding entrance, and being refused, may break open the doors to see and suppress the disorder; and this is constantly used in *London* and *Middlesex*.

I come now in the *last* place to consider what the constable is to do with his prisoner that he hath thus arrested for felony, or other causes above-mentiond.

In case of a sudden affray through passion or excess of drink, he may put the persons in the stocks, or in a prison, if there be one in the vill, till the heat of their passion or intemperance is over, tho he delivers them afterwards, or till he can bring them before a justice of peace.

If an offense be committed, for which the constable may arrest, he may convey them to the sheriff, or his gaoler of the county; and

(*) *Vide* Part I. p. 580.

if it be within a franchise, he may deliver them to the gaol of the franchise, and they are bound to receive them without taking any fine for the same by the statute of 4 *E. 3. cap. 10. vide 5 H. 4. cap. 10. 23 H. 8. cap. 2.* But the safest and best way in all cases, is to bring them to a justice of peace, and by them the prisoner may be bailed or committed, as the case shall require; but till they are bailed or discharged, or the sheriff or gaoler hath received them, they are still under the charge of the constable that took them. 10 *H. 4. 7. a. Escape 6.* Till the constable can conveniently convey the parties arrested to a justice of peace, or the common gaol, as when the arrest is in or near night, he may detain the party in the stocks; or if there be no stocks in that vill, he may bring them to the stocks of the next adjacent vill.

And if the person be of quality or sick, the constable may [keep him in an house (i)] for a day and a night at least, [96] and in some cases of necessity for a longer time, till he can with safety and conveniency convey him to a justice of peace, or the common gaol. 20 *E. 4. 6. b. 22 E. 4. 35. b. Dalt. p. 340.*

The charges of sending malefactors to gaol by the common law, is to be borne by the vill where they are apprehended. 3 *E. 3. Coron. 328. 4 E. 3. cap. 10.*

But now by the statute of 3 *Jac. cap. 10.* the charge is to be borne by the prisoner, if he hath wherewith, the same to be levied by warrant of the justices of peace; and if he hath not wherewith, then the charge to be borne by the parish, township, or tithing, where the offender is apprehended, by a tax or rate to be made, as by the said act is prescribed.

And what I have herein said touching the constable is applicable to a tithing-man, headborough, burtholder, for their authority is much the same.

But the constable of the hundred is a distinct officer, and introduced upon the statute of *Winton, vide H. 37 Eliz. B. R. Croke, n. 25. Sharrock and Hanmer;* yet he seems to be a conservator of the peace.

V. *Watchmen:* Watchers are of three kinds, 1. That which is appointed by the statute of *Winton, cap. 4.* which is that from *Ascension-day* until *Michaelmas*, watches shall be kept in all towns from

(i) These words are not in the MS. but they or others to the like effect are manifestly wanted to supply the sense.

sun-setting to sun-rising in boroughs, &c. by twelve, in other towns by six or four, according to the number of the inhabitants: this watch is to be set by the constable, and the neglect thereof punishable by 5 *H. 4. cap. 3.* Their power is to arrest such as pass by until the morning, and if no suspicion, they are then to be delivered, and if suspicion be touching them, they shall be delivered to the theriff, *viz.* to the common gaol, there to remain until they be in due manner delivered; and if they will not obey the arrest, hue and cry shall be

[97] levied upon them; but this watch extends only between *Ascension day* and *Michaelmas*.

2. But there is another watch that may be kept by the constable *ex officio*, which may extend to other times, because there be other things under his charge, as a conservator of the peace, as for the purpose to raise or pursue hue and cry upon robberies committed by the statute of *Winton, cap. 1.* to search for lodgers in suburbs of cities, that are suspicious persons, which is to be done every week, or at least once in fifteen days by the same statute, *cap. 4.* for such as ride or go armed by the statute of 2 *E. 3. cap. 3.* for night-walkers and persons suspicious either by night or day by the statute of 5 *E. 3. cap. 14.*

And altho a constable is not bound to any precise time for this kind of watch, nor punishable, if he omit it barely for the omission, if he be ready upon occasion to do his office, when required in these cases, yet it is in his power to hold such watches, as often as he pleases, and it is convenient and justifiable, and herein the watchmen are the ministers and assistants of the constable, and are under the same protection with him, and may act as he doth; and regularly he ought to be in company with them in their walk and watch.

3. There is yet a third kind of watch, which is by authority of the justices of peace, which may be held at other times than the statute of *Winton* appoints, and the watch thus appointed hath the same power as either of the former; and this seems to be within the power of any one justice of peace by the first *Assignavimus* in his commission; *vide Lamb. Justic. Lib. I. cap. 20. p. 185. Dalt. cap. 60. p. 142. (k), and cap. 109. p. 292. (l);* but the safer way and more usual is by order of the sessions of the peace or of the court of king's bench, which hath the highest ordinary authority in matters of the peace and preservation thereof.

(k) *New Edit. cap. 104. p. 352.*

(l) *New Edit. cap. 109. p. 536.*

Now a watchman hath a double protection of the law, *viz.* 1. As an assistant to the constable, when the constable is present or in the watch, for so every man, who is assisting to the constable in the execution of his office, hath the same protection, that the law gives the constable. 2. Purely as a watchman set by order of law; and the law takes notice of his authority *sub eo nomine*, and therefore killing of a watchman in execution of his office is murder. *Co. P. C. cap. 7. p. 52. 9 Co. Rep. 66. a. Mackally's case.* [98]

And such a watchman may apprehend night-walkers and commit them to custody till the morning, and also felons and persons suspected of felony.

And thus far of arrests *virtute officii*.

See Burn. Tit. Arrest. per tot. Index to 2 Hawk. P. C. Tit. Arrest. Foster 136, 319, 320 & 4. Blackf. Com. ch. 21. Of arrests; pa. 289, &c. See Burn. Tit. Constable. Burn. tit. Watch.

CHAP. XII.

Of arrests of felons upon hue and cry raised.

HUE and cry is the old common law process after felons and such as have dangerously wounded any person: And this hath received great countenance and authority by several acts of parliament.

By the statute of *Westm. 1. cap. 9. (a)*, it is enacted, "That all
" be ready and apparelled at the summons of the sheriff & a cry de
" pays to pursue and arrest felons as well within franchises as with-
" out; and if they do it not and be thereof attaint, *le roy prendra a*
" *eux grevement*, they are to be indicted and fined for the neglect.

By the statute of 4 E. 1. *De officio coronatoris* "Hue and cry shall
" be levied for all murders, burglaries, men-slain, or in peril to be
" slain, as other-where is used in *England*, and all shall follow the
" hue and steps as near as they can; and he that doth not, and is
" convict thereof, shall be attached to be before the justices in *eyre*."

By the statute of *Winton, cap. 1.* "From henceforth every coun-
" try shall be so well kept, that immediately upon robberies and

(a) 2 Co. Instit. p. 171.



“ felonies committed fresh suit shall be made from town to town,
 “ and from country to country :” and *cap. 4.* “ If any will not
 “ obey the arrest of the town, where night-walkers pass, they
 “ shall levy *hue and cry* upon them; and such as keep the town,
 “ (*viz.* the bailiff or constable), shall follow with *hue and cry* with
 “ all the town and the towns near; and so *hue and cry* shall be made
 “ from town to town, until they are taken and delivered to the she-
 “ riff; and for arrestments of such strangers none shall be pu-
 “ nished.”

And this is in truth but the antient law; thus it appears by *Braeton*, *Lib. III. cap. 1.* where he mentions a provision *per dominum regem & ejus consilium*, (which must be intended an antient act of parliament,) *quod omnes tam milites quam alii, qui sunt quindecim annorum & amplius, jurare debent, quod utlegatos, murtheratores, robbatores, & burglatores non receptabunt, nec iis consentirent, nec eorum receptatori- bus, & si quos tales noverint, eos attachiari faciem, & hoc vice-comiti & bellivis suis monstrabunt, & si huesum vel clamorem de talibus au- diverint, statim audito clamore sequentur cum familiâ & hominibus de terrâ suâ (*)*.

And it is one of the articles of inquiry in the leet in the statute *de visu franci plegii, de hues levies & nient pursues*, and among the *capitula Itineris de huesio levato & non secuto: vide Coke super stat. Westm. 1. cap. 9. 2 Instit. p. 172.*

And altho it is a good course to have a justice of peace to direct his warrant for raising *hue and cry* to prevent causeless *hues* and *cries*, yet it is neither of absolute necessity nor sometimes convenient; for the felons may escape before the justice can be found, and *hue and cry* was part of the law before the statute of 1 *E. 3. cap. 16.* which first instituted justices of peace.

And altho also it is specially incumbent upon constables to pursue *hue and cry*, when called upon, and they are severally punished, if they neglect it (*b*), and it prevents many inconveniencies, if they be
 [100] there; for it gives a greater authority to their pursuit, and enables the pursuants in his assistance to plead the general

(*) *Vide Part I. p. 23 & 24. in notis.*

(b) By 8 *Geo. 2. cap. 16.* “ If any
 “ constable, headborough, &c. within the
 “ hundred wherein any robbery shall hap-
 “ pen, shall refuse or neglect to make
 “ *hue and cry* after the felons with the

“ utmost expedition, as soon as he shall
 “ receive notice thereof, he shall, for
 “ every such refusal or neglect, forfeit
 “ five pounds, one half to the king, and
 “ the other half to such person as shall
 “ sue for the same.”

issue upon the statutes of 7 & 21 *Jac.* without being driven to special pleading; and therefore to prevent inconveniencies that may happen by unruliness, it is most adviseable, that the constable be called to this action.

Yet upon a robbery or other felony committed, *hue* and *cry* may be raised by the country in the absence of the constable, it is therefore called *Cry de pais*.

Neither is there any inconvenience considerable in it; for if *hue* and *cry* be raised without cause, they that raise it are punishable by fine and imprisonment. 2 *Co. Instit.* p. 173.

And accordingly it was agreed by the two chief justices and three other judges, upon the trial of *Packhurst*, *Jackson*, and others, who were all convicted of murder, and executed, for killing two of the countrymen that followed them, being highway robbers. *Lent vacation, anno Car. 2.* 26.

In this matter of *hue* and *cry* these things are considerable, *viz.* 1. By whom it is to be levied. 2. How it is to be levied. 3. In what manner to be pursued. 4. What may be done by them that pursue it. 5. How punished, if omitted or neglected.

I. *Hue* and *Cry* may be raised as well by an officer of justice, as by the precept of a justice of peace upon information of a felony.

Or it may be raised by any private person that is robbed, or knows of any felony.

II. Touching the manner of it: It is diverse according to a variety of circumstances. 1. The party that levies it ought to come to the constable of the vill, and give him notice of a felony committed, and give him such reasonable assurance thereof as the nature of the case will bear. 2. If he knows the name of him that did it, he must tell the constable the same. 3. If he knows it not, but can describe him, he must describe his person, or his habit, or his horse, or such circumstances that he knows, which may conduce to his discovery. 4. If the thing be done in the night, so that he knows none of these circumstances, he must mention the number of the persons, or the way they took. 5. If none of all these can be discovered, as [101] where a robbery, or burglary, or felony is committed in the night, yet they are to acquaint the constable with the fact, and desire him to search in his town for suspected persons, and to make *hue* and *cry* after such as may be probably suspected as being persons vagrant

in the same night, for many circumstances may *ex post facto* be useful for discovering a malefactor, which cannot be at first found (*c*).

III. In what manner it is to be pursued. 1. The constable is to make search in his own vill, 2 *E.* 4. 8 & 9. 2. He is to raise all the neighbouring vills next about, *Crompt. de Pace*, f. 178. *b.* 3. It is to be pursued with horse and foot: *vide* 27 *Eliz.* cap. 13. *Dalt.* cap. 28. p. 75. (*d*), *per direction de Hyde*, chief justice.

IV. What may be done in pursuance of a *hue* and *cry* levied, and therein I think as followeth:

1. That in case of *hue* and *cry* once raised and levied upon supposal of a felony committed, tho in truth there was no felony committed, yet those that pursue *hue* and *cry* may arrest and proceed, as if so be a felony had been really committed.

And therefore the justification of an imprisonment by a person upon suspicion, and by a person, especially a constable, upon *hue* and *cry* levied do extremely differ; for in the former, there must be a felony averred to be done, and it is issuable; but in the latter, *viz.* upon *hue* and *cry* it need not be averred, but the *hue* and *cry* levied upon information of a felony is sufficient, tho perchance the information were false; and therefore I do not find any averment of a felony committed in case of a justification of an im- [102] prisonment upon *hue* and *cry*. 5 *H.* 7. 5. *a.* 21 *H.* 7. 28. *a.* *per Rede*, 2 *E.* 4. 8 & 9

And the reasons hereof are these. 1. Because the constable cannot examine the truth or falshood of the suggestion of him that first levied it, for he cannot administer him an oath, and if he should forbear his pursuit of the *hue* and *cry*, till it be examined by a justice of peace, the felon might escape, and the pursuit would be lost and fruitless. 2. Because the constable is by the acts of parliament

(*c*) By 27 *Eliz.* cap. 13. To the levying of *hue* and *cry*, so as to charge the hundred for any robbery it is requisite, "That the party robbed do, with all convenient speed, give notice thereof to the inhabitants of some town, village, or hamlet, near the place where the robbery was committed;" And by 8 *Geo.* 2. cap. 16. it is further required, "That the party robbed do, with all convenient speed, give notice thereof to some constable, headborough, &c. of some town, &c. near the place of the robbery, or leave notice in writing of

"such robbery at the dwelling-house of such constable, &c. describing, as far as the nature and circumstances of the case will admit, the felon or felons, and the time and place of the robbery; and also within twenty days next after the robbery committed, cause public notice to be given thereof in the *London Gazette*, therein likewise describing the felon or felons, and the time and place of such robbery, together with the goods whereof he was robbed." See 2 *WILSON* 112, 113.

(*d*) *New Edit.* cap. 54. p. 169.

before-

before-mentiond compellible to pursue *hue* and *cry*, and he is punishable, and so are those of the vill, if they do it not, as appears by the acts of parliament above-mentiond. 3. Because he that first raiseth *hue* and *cry*, where no felony is committed, *viz.* the person that giveth the false information, is severely punishable by fine and imprisonment, if the information be false. 21 H. 7. 28. a. 29 E. 3. 39. a. b. 2 Co. Instit. p. 173.

And therefore if he raise a *hue* and *cry* upon a person that is innocent, yet they that pursue the *hue* and *cry*, may justify the imprisonment of that innocent person, and the raiser is punishable; and by the same reason, if he give notice of a felony committed, when there was in truth none.

2. If *hue* and *cry* be raised against a person certain for felony, tho possibly he is innocent, yet the constables, and those that follow the *hue* and *cry*, may arrest and imprison him in the common gaol, or carry him to a justice of peace.

3. If the person pursued by *hue* and *cry* be in a house, and the doors are shut, and refused to be opened, upon demand of the constable, and notification of his business, he may break open the doors; and this he may do in any case where he may arrest, tho it be only a suspicion of felony, for it is for the king and commonwealth, and therefore a virtual *non omittas* is in the case: *vide* 5 Co. Rep. 92. b. *Semain's case*. And the same law is upon a dangerous wound given, and a *hue* and *cry* levied upon the offender. 7 E. 3. 16. b. *Barre* 291.

And it seems in this case, that if he cannot be otherwise taken, he may be kild, and the necessity excuseth the constable: *vide* Part I. cap. 9. p. 53.

4. Upon *hue* and *cry* levied against any person, or where any *hue* and *cry* comes to a constable, whether the person be [103] certain or uncertain, the constable may search in suspected places within his vill for the apprehending of the felons. *Dalt. cap.* 28. p. 75. (e), *Crompt. de Pace*, f. 178. b. 2 E. 4. 8. b.

But tho he may search suspected places or houses, yet his entry must be *per ostia aperta*, for he cannot break open doors barely to search, unless the person against whom the *hue* and *cry* is levied be there, and then it is true he may; therefore in case of such a search,

the breaking open the door is at his peril, *viz.* justifiable, if he be there; not justifiable, if he be not there; but it must be always remembered, that in case of breaking open a door, there must be first a notice given to them within of his business, and a demand of entrance, and a refusal before doors can be broken.

5. If the *hue* and *cry* be not against a person certain, but by description of his stature, person, clothes, horse, &c. the *hue* and *cry* doth justify the constable, or other person following it, in apprehending the person so described, whether innocent or guilty, for that is his warrant, it is a kind of process, that the law allows (not usual in other cases), *viz.* to arrest a person by description.

6. But if the *hue* and *cry* be upon a robbery, burglary, manslaughter, or other felony committed, but the person that did the fact is neither known nor describable by person, clothes, or the like, yet such a *hue* and *cry* is good, as hath been said, and must be pursued, tho no person certain be named or described.

And therefore in this case all that can be done is for those that pursue the *hue* and *cry*, to take such persons as they have probable cause to suspect; as for instance, such persons as are vagrants, that cannot give an account where they live, whence they are, or such suspicious persons as come late into their inn or lodgings, and give no reasonable account where they had been, and the like: *vide* 2 E. 4. 8. b.

[104] And here the justification of the imprisonment is mixed partly upon the *hue* and *cry*, and partly upon their own suspicion; and therefore, 1. In respect that it is upon *hue* and *cry* there needs no averment that the felony was done, yet it must be averred; that an information was given, that the felony was done, if the arrest be by that constable that first received the information, and so raised the *hue* and *cry*; or if the arrest were made by that constable, or those vills to whom the *hue* and *cry* came at the second hand, it must be averred that such a *hue* and *cry* came to them purporting such a felony to be done; but, 2. Also in as much as the *hue* and *cry* neither names nor describes the person of the felon, but only the felony committed, and therefore the arrest of this or that particular person, and so applied, is left to the suspicion and discretion of the constable, or the people of the second or third vill, he that arrests any person upon such general *hue* and *cry* must aver that he suspected, and shew a reasonable cause of suspicion.

But

But now by the statute of 7 *Jac. cap. 5.* the constable or any that come in his assistance, even in this case of *hue and cry*, may plead the general issue, and give the whole matter of the justification in evidence for the pursuit of *hue and cry*, tho performed by others as well as the constable, is principally the act of the constable of the vill, and the others are but as his deputies or assistants within the precincts of their constable-wick.

V. For the last matter, how the neglect of the pursuit of *hue and cry* is to be punished, it hath been before declared upon the statutes of 3 *E. 1. cap. 9.* 4 *E. 1.* and 13 *E. 1.* of *Winton*, they are to be indicted, fined and imprisoned.

Burn. tit. Hue and Cry. Index to 2 Hawk. P. C. tit. Hue and Cry. 4 Blackf. Com. ch. 21. p. 293.

CHAP. XIII.

[105]

Arrests of felons virtute præcepti, or of warrants.

I COME now to consider of arrests of felons or persons suspected of felony by warrant or precept, namely not of precepts that issue upon matter of record, as upon appeals or indictments, which regularly are to be by writ, but such warrants as are preparatory to it, or for conservation of the peace.

And herein regularly all courts and persons, that have judicial power by the common law, or by act of parliament for the conservation of the peace, have power to grant warrants for arresting of felons; but such as are simply ministerial and have no jurisdiction, as constables, cannot issue warrants for that purpose, but must do their office either alone, or with others called to their assistance.

The court of king's bench hath not only a power to issue writs upon indictments or appeals before them, but have also power by order to command the sheriff of the county where they sit, or the marshal of the court, to apprehend felons or disturbers of the peace, and bring them before the court; and this is warrantable by the custom of the court, which is part of the law of the land.

Yea I have known by great advice, that where there hath been information upon oath of a breach of the peace, and a design by persons

persons whose names could not be known, to commit a riot or breach of the peace, an order hath been made by the court to the sheriff to bring before them such persons as should be probably suspected to be parties therein, and to bring them into the court, *M. 23 Car. 2. in Storie's case*, for attempting to take away the daughter of Mrs. *Gilburn* with masks and vizards.

See before *cap. 1.* concerning the king's bench.

[106] A commission issues out of the *chancery* under the great seal to take persons that were notoriously famed of felony or trespass, tho they were not indicted, and by virtue hereof the commissioners issue a precept to *B.* to take *J. S.* that had dangerously wounded another; this was admitted a good justification in the officer, tho the commission itself was against law, *24 E. 3. 9. B. Faux Imprisonment 9. Vide simile 42 Affiz. 5.* where a commission issuing out of *chancery* to take *J. S.* and his goods, before he was indicted, is ruled to be against law.

And therefore I would never advise those general proclamations, that have sometimes issued, to take certain persons notoriously suspected of felony but not indicted.

It is true, that such a proclamation may be a means to give notice of felons, but so it may perchance include true men; and therefore what by law a constable, sheriff, officer, or private persons may do in arresting of felons or suspected persons without such a proclamation may be justifiable, but not by virtue of the proclamation, neither can any justification be made by virtue of it; and therefore such proclamations against persons not indicted are against law, and may bring great inconveniencies, 1. By leading the country into an error. 2. By the example itself, which may be of ill consequence to honest men, as well as of use to apprehend felons.

27 Affiz. 35. A man was indicted of felony before justices of *oyer and terminer*: It is admitted, that the justices may not only award process of outlawry thereupon, but may also issue a commission (which is no other than a warrant under their hands and seals) to take the party, and that by virtue of such a warrant or commission they may break open doors, but they must shew their commission, if demanded.

By the common law the sheriff of the county might give out a warrant for the apprehending a felon before indictment; and this is farther confirmed by the statute of *3 E. 1. cap. 9. au commandment*,

Et a les summons de viscount Et au cry de pays must be understood disjunctively, (*or at the cry of the country*) for the sheriff had jurisdiction at the common law to take indictments of old felonies in his *Turn*; and so he hath still, tho he is not now to make process upon them by the statute of 1 *E. 4. cap. 2.* [107]

The coroners have also power to attach manslaughterers by their warrants after inquisition, whereby they are found guilty, but that seems not to be all their power; but they may make out warrants for apprehending those persons that are not, or cannot be presented before them, as those that were present and not guilty; nay also of burglars and robbers, and yet they cannot take an inquisition touching them; this appears evidently by the statutes of 3 *E. 1. cap. 9.* and 4 *E. 1. Officium coronatoris.* And with this agrees the common usage at this day for the coroners to take manslaughterers before their inquisition be taken, for many times the inquest is long in their inquiry, and the offender may escape, if he stay till the inquisition deliverd up.

But because at this day the greatest part of the business of this nature is dispatched by justices of the peace, I shall be more large touching their warrants, wherein nevertheless much of what is said therein will be applicable to the warrants that issue in like cases by other persons.

And therein I shall principally consider these particulars, 1. When and in what cases they may issue their warrants for the apprehending of felons. 2. To whom. 3. How and in what manner such precept or warrant is to issue. 4. What may be done by the officer in pursuance thereof.

I. As touching the first, in what cases justices of peace may make warrants for the taking of felons or persons suspect of felony.

My lord *Coke* in his jurisdiction of courts, *cap. 31. p. 176, 177.* hath deliverd certain tenets, which, if they should hold to be law, would much abridge the power of justices of peace, and condemn the constant and usual practice, and give a loose to felons to escape unpunished in most cases (*), *viz.* 1. That a justice of peace cannot upon complaint issue a warrant to apprehend a felon before indictment, grounding himself upon the hasty opinion of *Fitzherbert* and *Brudnell*, 14 *H. 8. 16. a.* who yet hold the officer excused, that makes the arrest upon that warrant. 2. That admit he may

(*) *Vide Part I. p. 575 Et supra p. 79.*

arrest, yet he cannot break open a house to take the felon by virtue of that warrant. 3. That admit he may arrest by that warrant, yet he cannot issue a warrant in case only of suspicion. 4. That admit he may, yet no house can be broken by virtue of such warrant.

Touching the *second* and *fourth* matter I shall consider them, when I come to the business of the officer's power in pursuance of a justice's warrant; but touching the power of issuing this warrant by the justices of peace, I shall now consider it: And therein I say as followeth.

1. That a justice of peace hath power to issue a warrant to apprehend a person accused of felony, tho not yet indicted.

That, upon which the doubt must arise to those that made a doubt of it, must certainly be the statutes of *Magna Charta*, cap. 29. *Nullus liber homo imprisonetur &c. nisi per legale iudicium parium suorum vel per legem terræ.* 25 E. 3. cap. 4. "None shall be taken
 " upon suggestion made to the king or his council, unless it be by
 " presentment or indictment, &c. or by writ original at the com-
 " mon law." 28 E. 3. cap. 3. "No man shall be taken, or im-
 " prisoned, or disinherited, or put to death without being brought to
 " answer by due process of law." 42 E. 3. cap. 3. "Whereas
 " upon false accusations people have been brought before the king
 " and council, it is enacted, that no man shall be put to answer
 " without presentment before justices or matter of record, or by due
 " process and writ original according to the old law of the land.

Now all the weight of the question upon these statutes is to see what the law of the land is; for if these preparatory arrests of felons be not against the law of the land, they are not restrained by these statutes. Certainly by the law of the land, if a felony were committed, or but suspected to be committed, a man might be arrested by the party that knows, or upon probable grounds suspects him to be the felon; or by a constable upon complaint, or upon *hue and cry*, and he might be carried to prison, and there detained till delivered

[109] by due course of law; and yet this person so arrested not all this while indicted: *vide statutes* 3 E. 1. cap. 9. 4 E. 3. cap. 10. and 5 E. 3. cap. 14. And all this was in order to preserve the peace of the kingdom, and to suppress felons.

But this being not found effectual enough, by the statute of 1 E. 3. cap. 16. for the better keeping and maintaining of the peace commissions

missions are to issue for the same in the several counties; this was their primitive institution. Their power was enlarged by the statute of 18 *E. 3. cap. 2.* to hear and determine felonies and trespasses: and by the statute of 34 *E. 3. cap. 1.* their power is farther enlarged, and particularly their taking as well persons suspected as indicted of felonies mentioned in that act is required, which, tho perchance it refer only to those that have been robbers and gone beyond the sea and since returned, yet it is a pattern for others.

Now by these statutes surely as much power is intended to be translated to the justices of peace in order to the preservation thereof, as was in a constable or private person, for the justices of the peace are conservators of the peace and more.

And let a man look upon all the acts of parliament, that have been down to this day, he shall find that the power of justices of peace to convene and commit felons before indictment is allowed. 4 *E. 3. cap. 2.* Sheriffs shall not let to mainprise such as be indicted or taken by justices of peace, unless mainpernable by law, 1 *R. 3. cap. 3.* and 3 *H. 7. cap. 3.* concerning bailing of prisoners committed upon suspicion, 1 & 2 *P. & M. cap. 13.* 2 & 3 *P. & M. cap. 10.* by which it appears, that justices of peace may commit for felony, yea or for suspicion of felony, 3 *Jac. cap. 10.* 5 *H. 4. cap. 10.* so that the imprisonment before indictment is surely lawful and not within the restraint of *Magna Charta*; and if so, then surely their arrest is much more lawful, for it is but to bring persons to an examination in order to their commitment, bail, or discharge; and there is no greater record of their commitment than of their arrests.

2. He may also issue a warrant to apprehend a person suspected of felony, tho the original suspicion be not in himself, but in [110] the party that prays his warrant; and the reason is, because he is a competent judge of the probabilities offered to him of such suspicion.

And as a constable may upon complaint arrest a person suspected of felony, as appears by what hath been said in the foregoing chapters (*), so a justice of peace may do the like by his warrant; and it is also the constant practice accordingly.

But that I may say it once for all, it is fit in all cases of warrants for arresting for felony, much more for suspicion of felony, to examine upon oath the party requiring a warrant, as well whether a

(*) *Vide cap. 10. p. 80. and cap. 11. p. 91. See also Part I. p. 610.*

felony were done, as also the causes of his suspicion, for he is in this case a competent judge of those circumstances that may induce the granting of a warrant to arrest.

And if there were no other reason to prove it than this, it were sufficient; namely, that the justice of peace may commit him to gaol that is brought before him for such suspicion, or bail him, as appears by the statutes of 1 R. 3. cap. 3. 3 H. 7. cap. 3. 1 & 2 P. & M. cap. 10. and therefore *à fortiori* may make a warrant to convene or bring him before him to examine the cause of the suspicion.

II. As touching the second matter, to whom this warrant is to be directed?

Usually the warrant or precept is directed to the sheriff, or bailiff, constable, or tithingman, and they are bound to execute it; and if they do not, they may be indicted and fined for their neglect.

But it may be directed to any private person or his own servant, 14 H. 8. 16. a. *Crompt. de Pace, f. 147. b* but he is not bound to execute it; but if he execute it, it is as good as if he were an officer.

If a warrant be directed from a justice of peace to a constable of *D.* to arrest a felon, &c. he is not bound to go out of the vill, where he is constable, to execute the warrant; but yet if he do execute it in another vill, it is good enough, for he acts herein not simply as con-

[111] stable of *D.* but by virtue of the justice's warrant; and so it was ruled in my time at the assizes in *Norfolk* about 1668.

III. As to the third matter, how and in what manner it is to be made or issued? Touching which these things are regularly to be observed.

The party that demands it ought to be examined upon his oath touching the whole matter, whereupon the warrant is demanded, and that examination put into writing.

The party charging another thus with felony ought to be bound by recognizance to prosecute at the next sessions or assizes, as the case shall require. *Dalt. cap. 117. p. 334. (a).*

The warrant ought to be under the hand and seal of the justice, 2 Co. *Instit. p. 52.* It must have a certain date, but the place, tho it must be alledged in pleading, need not be expressed in the warrant. 14 H. 8. 16. a.

Regularly the warrant ought to contain the cause specially, and should not be generally *to answer such matters as shall be objected*

(a) *New Edit. cap. 169. p. 579.*

against

against him, because it cannot appear, whether it be within the jurisdiction of the justice of peace, neither can it appear whether the party beailable or not. 2 Co. Instit. p. 52. 591.

And therefore upon such a general warrant returned upon an *habeas corpus*, it is in the pleasure of the court of king's bench to bail or discharge him; and accordingly for this reason, P. 23 Car. B. R. in *Brown's* case, he was discharged.

But yet I hold such a warrant is not therefore void, but if *de facto* the matter be within the jurisdiction of the justice, and so averred, such a general warrant is a good justification especially in case of felony, and antiently it was generally held such general warrants were good in cases of treason or felony (*), tho in warrants of the peace and good behaviour the cause must be shewn, that the party may come provided with his sureties; and accordingly *vide Rastal's Entries*, tit. Attachment 1. Dalt. cap. 117. p. 329. (b), *Crompt. de Pace*, f. 148. a. T. 37 Eliz. C. B. *Broughton and Mulshoe* (c); and accordingly ruled by my lord *Coke* himself contrary to his [112] opinion in his comment upon *Magna Charta*, T. 7 Jac. C. B. the case of the mayor of *Canterbury*: *vide supra*, Part I. cap. 54. p. 609. Breach of prison.

A justice of peace may make his warrant to apprehend a person suspected by name upon a complaint made to him; but where upon a complaint to a justice of a robbery he made a warrant to apprehend all persons suspected, and bring them before him, this was ruled a void warrant, P. 24 Car. 1. in the case of justice *Swallowe*, and was not a sufficient justification in false imprisonment.

A justice of peace may make a warrant as well in case of felony as of the peace to bring the party *before himself*, and then the officer ought to bring the party before him, that made the warrant, 5 Co. Rep. 59. b. *Foster's* case; or he may make the warrant to bring him *before any of his majesty's justices of the peace*, or *before himself*, or *any of his majesty's justices of the peace*, and then it is in the election of the officer to bring him before which justice of the county he pleases; and it is not in the election of the party to go before whom he pleases; adjudged 5 Co. Rep. 59. b. *Foster's* case against the opinion of *Fineux* 21 H. 7. 21. a.

(*) *Crompt. 233. b. 1 Sid. 78. Dalt. p. 574.* and Sir William Wyndham's case, Trin. 2 Geo. I. B. R. *Vide tamen* the case of *Kendal and Rowe*, State Tr. Vol. IV. p. 861,

862. 5 Mod. Rep. p. 80. 82, 85.

(b) *New Edit. p. 574.*

(c) *Moore, p. 408.*

And in some cases he may make his warrant to bring him to the sessions of the peace, tho it is better to bring him before himself or some justice, that the party may be in the mean time bailed, if there be cause, to appear at the sessions of the peace or gaol-delivery, as the cause shall require.

A warrant of the peace may be to bring the party complained of to the justice, to the intent to find sureties for his appearance at the sessions, &c. and in the mean time to keep the peace, or the warrant may be *si recusaverit*, then to bring him to the common gaol *ibidem moraturus, quousque gratis hoc fecerit*; and yet the constable or officer may bring him in that case before the justice; and if he refuse there to give sureties, he may by virtue of the first warrant bring him to gaol, and commit without any farther warrant or *mittimus*, 5 Co. Rep. 59. b. Foster's case.

[113] The warrant of a justice before indictment may be in the king's name with the *Teste* of the justice, or it may be in the name of the justice of peace himself; the latter most usual; but process after indictment issued from a sessions of the peace is always in the king's name, *Dalt. Justice*, p. 404. 347, 348. (d). But whether generally a justice of peace out of sessions can issue a warrant to apprehend persons offending against a penal law, tho within their cognizance, and so to bind them over to the sessions, or in default thereof to commit them, and this before indictment, seems doubtful: *vide Lamb.* 188, 189. *Dalt. cap.* 117. p. 331. (e). These things seem to make against it. 1. Because some acts of parliament do particularly and expressly authorize them to it, which they would not have done, if it had been otherwise lawful. 2. Because in most cases of this nature, tho the party were indicted, or an information preferred, yet the *capias* was not the first process but a *venire facias* and *distringas*, and in cases of information no process of outlawry at all, 8 H. 6. 9. b. until the statute of 21 Jac. cap 4. gave process of outlawry in actions popular, as in actions of trespass *vi & armis*.

In case of a complaint and oath of goods stolen, and that he suspects the goods are in such a house, and shews the cause of his suspicion, the justice of peace may grant a warrant to search in those suspected places mentioned in his warrant, and to attach the goods and the party in whose custody they are found, and bring them before him or some justice of peace to give an account how he came by them, and farther

(d) *New Edit.* p. 593.

(e) *New Edit.* p. 576.

to abide such order, as to law shall appertain: *vide Dalt. p. 353. (f)*

And this is warrantable by law, and without it felons could not in many cases be discovered, and is the constant practice at this day, notwithstanding the opinion of my lord *Coke* in his jurisdiction of courts, *p. 176.*

But in that case it is convenient, 1. To express that the searches be made in the day-time. 2. That the party suspecting be present to give the officer information of his goods. 3. There can be no breaking open of doors to make the search, but he must enter [114]
per ostia aperta, or upon the voluntary opening of the door by the house-keeper or his servants; and the reason is, because the bare having of stolen goods in his house doth not necessarily make a man either a felon or accessory. 4. But because the having of stolen goods in his custody is *prima facie* an evidence of a felony and a good cause of suspicion, it is a lawful clause in the warrant to attach the party, in whose custody they are found, to come before the justice. 5. The goods being found ought not to be delivered to the party complaining, but to remain in the constable's hand, till either by a writ of restitution upon the conviction of the felony, or by due order of the court they be delivered.

But the general warrant to search all places, whereof the party and officer have suspicion, tho it be usual, yet it is not so safe upon the reason of justice *Swallow's* case before cited; and yet see precedents of such general warrants, *Dalt p. 353, 354.*

The warrant of a justice of peace ought regularly to mention the name of the party to be attached, and must not be left in generals or with blanks to be filled up by the party afterwards. *Dalt. cap. 117. p. 329. (g).* If there be a riot or breach of the peace in the presence of one or more justices, they may arrest the rioters themselves, or command any officers or others by word of mouth without warrant to arrest them, and they may by virtue thereof *flagrante crimine* arrest them in the absence of the justice by the true meaning of the statute of 34 E. 3. cap. 1. and 13 H. 4. cap. 7. *quod vide* adjudged 14 H. 7. 9 & 10.

And therefore if a riot be committed and dispersed by the coming of the justice of peace, and they be suspected probably to meet again or threaten to do so, tho the constables may *ex officio* suppress the riot,

(f) *New Edit. p. 598.*

(g) *New Edit. p. 574.*

and raise the power of the vill to do it; yet I think it clear, that a justice of peace may deliver a special warrant in the hands of any person to arrest the rioters, if they re-assemble, tho there be no particular persons named in the warrant, because it may be impossible
 [115] to be known what their names are, and yet the peace is necessary to be kept, as well as the breach of it to be punished; and the justice cannot always personally watch their re-assembling, but must trust others to do it; and this is admitted of all hands in the book of 14 H. 7. 9. and the only doubt is, whether it may be done by word, which yet is adjudged there good.

And thus far for warrants.

IV. The fourth thing is the manner and order of their execution.

If a warrant or precept to arrest a felon come to an officer or other, if the felon be arrested and after arrest escape into another county, yet he may be pursued and taken upon fresh pursuit, and brought before the justice of the county where the warrant issued, for the law adjudgeth him always in the officer's custody by virtue of the first arrest; but if he escapes before arrest into another county, if it be a warrant barely for a misdemeanor, it seems the officer cannot pursue him into another county, because out of the jurisdiction of the justice that granted the warrant; but in case of felony, affray, or dangerous wounding, the officer may pursue him, and raise *hue and cry* upon him into any county, but if he takes him in a foreign county, he is to bring him to the gaol or justice of that county, where he is taken, for he doth not take him purely by the warrant of the justice, but by the authority that the law gives him; and the justice's warrant is a sufficient cause of suspicion and pursuit. 2 E. 4. 6. b. *Dalt. cap.* 118. p. 340. (h), 7 E. 3. 16. b. 11 E. 4. 4. b.

Tho a person, that hath a warrant to arrest for felony or other misdemeanor, may call others to his assistance, yet he cannot make a warrant to another as his deputy to execute it, or command another to execute it in his absence. 8 E. 4. 14. a.

But it is held, that if the warrant be directed to the sheriff, he may make a warrant to his bailiff to execute it, and may command by word his under-sheriff to execute it without any other warrant. 8 E. 4. 14. a. *Dalt. cap.* 117. p. 332. (i).

(b) *New Edit.* p. 24. & 585.

(i) *New Edit.* p. 577.

If a warrant issue from a justice of peace to a private person to arrest for felony or any other matter, he is not bound to shew his warrant, unless it be demanded, and then he must shew it.

But if it be directed to a known officer, as to the sheriff, who is a known officer in the county, or to a constable, who is a known officer in the vill, he is not bound to shew his warrant, tho demanded, no more than a bailiff *jurus & conus*; it is enough for him to say *I arrest you for felony, &c. in the king's name.* 8 E. 4. 14. a. 14 H. 7. 9. b. 21 H. 7. 23. a. 9 Co. Rep. 69. *Mackally's case* (*).

But it is reasonable and also safe for the officer to acquaint him what he attacheth or arresteth him for, for it is a great security to the officer that arrests him, and just for the party arrested to know the cause for what it is.

A warrant of a justice of peace to arrest for felony may be executed in a franchise within the county, for it is the king's suit, in which a *non omittas* is virtually included.

Where by virtue of a warrant from a justice of peace the house may be broken to apprehend a felon or other malefactor, there are these diversities.

Upon a warrant to search for stolen goods the doors cannot be broken open; for tho it be for the king, yet the law enables not the breaking of houses in all cases for the king: (*vide* statute 12 Car. 2. cap. 19. a special act to enable the search and breaking open of an house in case of goods uncustomed) and therefore the entry to search by such a warrant must be *per ostia aperta*.

So upon an *excommunicato capiendo*, tho it be the king's suit, yet doors cannot be broken to take him. H. 42 Eliz. C. B. *Croke*, n. 17. *Smith and Smith* (k).

If a justice of peace issues a warrant to apprehend a felon, who is in his own house, and after notice of the warrant and request to open the door it is refused or neglected to be done, the officer may break open the door to take him; and the same law is, if it be but for suspicion of felony. 13 E. 4. 9. a. 5 Co. Rep. 91. b. *Semain's case* (†).

(*) This was an arrest in a civil action, and the warrant there meant was not the writ or warrant for arresting the party, but the general warrant constituting him bailiff, and of this are the cases in the year-books here cited to be understood; tho it may be

otherwise in case of felony, because in such case a private person may arrest a felon without any warrant at all. *Vide Part I. p. 453. in notis.*

(k) *Cro. Eliz.* 741.

(†) *Part I. p. 582.*

And so much more may he break open the house of another person to take him, for so the sheriff may do upon a civil process. 5 *Co. Rep.* 93. *a.* *Semain's case.* But then he must at his peril see that the felon be there, for if the felon be not there, he is a trespasser to the stranger whose house it is; but in both cases the officer must first notify his business that he comes about, and demand admission. *Ibidem.*

But in case of warrants to search for stolen goods I think the doors of any person cannot be broken up.

If a warrant of the peace issue from a justice of peace, the officer or minister of such warrant may break open a door in case of refusal to open after demand and notice of his business: ruled by *Popham* and *Clerk* 3 *Jac. Dalt. cap.* 78. *p.* 204, 205. (1).

Now touching the killing of a man *justiciari se nolentis*, where there is a lawful warrant against him, much hath been said before; where I considered the constable's power (*); somewhat I shall say here.

It is necessary in this case to consider the difference between an arrest upon a warrant for felony, and an arrest for a simple misdemeanor.

And also a difference if the officer kills him in case of a flight, or of a resistance and an attempt of a rescue after arrest.

If there be a warrant against *A.* for a trespass or breach of the peace, and *A.* flies and will not yield to the arrest, or being taken makes his escape, the minister kills him, this is murder.

But if *A.* either upon the attempt to arrest, or after the arrest assault the minister, that hath the warrant to arrest him, to the intent to make his escape from him, and the minister standing upon his guard kills him, this is no felony, for being by law authorized to arrest him, he is not bound to go back to the wall, as in common cases of *se defendendo*, for the law is his protection. And therefore as on the one side if *A.* kills him, it is murder, so on the other side if upon this assault by *A.* the minister kills him, it is no felony; the necessity excuseth him, if he cannot otherwise save himself and perform his duty.

And herein it agrees with the common case of a sheriff's bailiff in the execution of his warrant. *Co. P. C. cap.* 8. *p.* 56.

(1) *New Edit. cap.* 127. *p.* 427.

(*) *Supra, p.* 91 & 77. *Part I. p.* 489.

But where a warrant issueth against a felon, and either before arrest or after he flies and defends himself with stones, as the book of 3 E. 3. *Coron.* 290. or with his bow and arrows, as the record is of *M. 22 E. 3. Rot.* 117. *coram rege Ebor (m)*, so that the officer must give over his pursuit, or otherwise cannot take him without killing him, if he kills him, it is no felony; and the same law is for a constable, that doth it *virtute officii*, or upon a pursuit of *hue and cry*.

And the same law it is, if in truth he were no felon, but yet a warrant is against him as suspect of felony, and he having notice thereof flies and resists, for the officer or minister ought to pursue his warrant, or otherwise he is punishable; and the party by his flight and resistance is accessory to his own death.

But then there must be these cautions. 1. He must be a lawful officer, or there must be a *hue and cry*, or there must be a lawful warrant. 2. That the party ought to have notice of the reason of the pursuit, namely because a warrant is against him, for his flight must be upon notice to him of the intent to arrest him for felony. 2 E. 4. 9. a. And 3. It must be a case of necessity, and that not such a necessity as in the former case, where an immediate [119] assault is made upon the minister just at his coming to arrest, or to rescue himself from him; but this is the necessity, *viz.* that he cannot otherwise be taken, and the reason is, because it is for the public good, and they are punishable, if they neglect in any manner what they ought to do, namely the minister by fine and imprisonment, and the township by an amercement.

But tho a private person may arrest a felon, and if he flies so as he cannot be taken without he be kild, it is excusable in this case for the necessity, 22 *Affiz.* 55. *per Thorp*, yet it is at his peril, that the party be a felon, for if he be innocent of the felony, the killing, at least before the arrest, seems at least manslaughter for the reason above

(m) This was the case of *Henry Vesey*, who had been indicted before the sheriff in *Turno suo anno R. R. nono* of divers felonies, whereupon the sheriff *mandavit commissionem suam Henrico de Clyderawe & aliis ad capiendum prædictum H. Vesey & salvo ducendum usque castrum de Ebor*. *Vesey* would not submit to an arrest, but fled, & inter fugiendum shot with his bow and arrows at his pursuers, but in the end was kild by *Clyderawe*. *Clyderawe* was

afterwards indicted, "*quod felonice interfecit prædictum H. Vesey, sed quia compertum est, quod prædictus H. de Clyderawe prædictum H. Vesey indictatum de diversis felonis iugam faciendo, ut felonem domini regis, virtute commissionis suæ prædictæ anno R. nono interfecit & non felonice; confideratum est, quod idem H. de Clyderawe eat inde quietus.*"

given, for an innocent person is not bound to take notice of a private person's suspicion (*).

If a justice of peace have jurisdiction in the case, (as he hath in all felonies and breaches of the peace, yea tho it be high-treason, so far forth as it is a breach of the peace) tho he errs in granting of his warrant, it seems that the officer that executes it, is excusable. 14 *H. 8. 16. a. per curiam.*

Yet in some cases, as touching rates for the poor, tho he hath jurisdiction in the matter by the statute of 43 *Eliz. cap. 2.* the officer is punishable for executing the warrant, where none ought to issue, because it is a circumscribed particular jurisdiction given him by act of parliament, which he ought strictly to pursue. *T. 10 Car. B. R. 2 Rol. Abr. 560. Nichols and Walker.*

When the officer or minister hath made his arrest, he is forthwith to bring the party to the gaol, or to the justice, according to the import of the warrant.

But if the time be unseasonable as in or near the night, whereby he cannot attend the justice, or if there be danger of a present rescue, or if the party be sick and not able at present to be brought, he may, as the case shall require, secure him in the stocks, or in case the
[120] quality of the person or the indisposition so require, secure him in a house till the next day, or such time as it may be reasonable to bring him. 2 *E. 4. 9 & 10. (†).*

When he hath brought him to the justice, yet he is in law still in his custody, till either the justice discharge or bail him, or till he be actually committed to the gaol by warrant of the justice. 10 *H. 4. 7. a. Escape 8.*

And thus far concerning arrests by warrant or precept.

See *Burn. tit. Arrest. Index to 2 Hawk. P. C. tit. Arrest. 4 Blackf. Comr ch. 21. Of Arrests. pa. 289. &c. See 2 Wilson 288. Entick v. Carrington touching General Warrants.*

(*) *Vide supra, p. 83.*

(†) *Vide supra, p. 95, 96.*

C H A P. XIV.

Concerning the office of a justice, when a person charged or suspected of felony is brought before him.

WHEN a party thus arrested for felony is brought to the justice of peace, he must either discharge, or commit, or bail him.

But preparatory to these acts there are some things, that are required of him before he do either.

1. By the statute of 1 & 2 P. & M. cap. 13. and 2 & 3 P. & M. cap. 10. he is to take the informations upon oath of the prosecutor and witnesses and put them into writing; and he is likewise to take the examination of the person accused, but this is to be without oath and put into writing.

And these examinations and informations he is afterwards to deliver into the general sessions of the peace or to the gaol-delivery, as the case shall require; and because it may be unseasonable to take these informations or examinations presently, or possibly it may take longer time, the prisoner may be continued in the custody of the officer, or may be detained in the justice's house, or committed to some near safe place of custody, till the examinations can be taken.

But this must be dispatched in some convenient time, and therefore, *P. 43 Eliz. C. B. Scavage and Tateham (a)*, in ^[121] an action of false imprisonment brought by a person brought before the mayor of *Pomfret*, a justice of peace, upon suspicion of felony, the defendant could not upon the account of examination justify the detaining him in the justice's house nineteen days; but it was held, that he might detain him three days upon that account.

2. It is fit to take a recognizance from the prosecutor to appear and prefer a bill of indictment, and also of the witnesses to appear and give evidence at the next sessions of the peace or gaol-delivery, as the case shall require, if he shall find cause to commit or bail the prisoner; otherwise it is, if he shall discharge him,

These things being thus premised, as I said, the prisoner is either to be discharged, or committed, or bailed.

(a) *Cro. Eliz.* 829. *Vide Part I. p. 586.*

I. Touching the discharge of a prisoner. If a prisoner be brought before a justice of peace expressly charged with felony by the oath of a party, the justice cannot discharge him, but must bail or commit him.

If he be charged with suspicion only of felony, yet if there be no felony at all proved to be committed, or if the fact charged as a felony be in truth no felony in point of law, the justice of peace may discharge him, as if a man be charged with felony for stealing of a parcel of the freehold, or for carrying away what was delivered him, and such like, for which tho there may be cause to bind him over as for a trespass, the justice may discharge him as to felony, because it is not felony, *Kelw. f. 34. 44 Affiz. 12. Poulton de Pace 146. b.* But if a man be kild by another, tho it be *per infortunium* or *se defendendo*, (which is not properly felony,) or in making an assault upon a minister of justice in execution of his office, (which is not at all felony,) yet the justice ought not to discharge him, for he must undergo his trial for it; and therefore he must be committed, or at least bailed.

[122] II. As touching commitment or imprisonment of a party brought before a justice for felony, or suspicion thereof, these things are to be observed:

1. The commitment must be by writing under the seal of the justice.

And therefore altho a justice may by word of mouth arrest a person for a breach of the peace done in his presence, yet in that case the commitment of him ought to be a *mittimus* under seal; thus it was resolved in *Sandford's case* (*), *P. 23 Car. 1. B. R.* but agreed he may detain him in his custody, till a warrant can be made.

And herein the power of a justice differs from the power of a court; for the court of king's bench may commit by order, and so may the court of sessions of the peace, because there is or ought to be a record of the commitment.

Nay in chancery, if an order be made for commitment of a person, till he enter into bond, &c. the warden of the *Fleet* may justify the imprisonment by virtue of that order. *T. 39 Eliz. B. R. 2 Rol. Abr. p. 559. Taylor and Beal.*

(*) *Part I. p. 612.*

2. The *mittimus* ought to have these circumstances. 1. It must contain the certainty of the cause, and therefore if it be for felony, it ought not to be generally *pro feloniam*, but it must contain the especial nature of the felony briefly, as *for felony for the death of J. S.* or *for burglary in breaking the house of J. S. &c.* and the reason is, because it may appear to the judges of the king's bench upon an *habeas corpus*, whether it be felony or not (+): and likewise by the statute of 3 H. 7. cap. 3. the sheriff is to make a calendar of the prisoners in his gaol, and deliver it to the justice of gaol-delivery signifying the prisoners and their causes: *vide 2 Co. Instit. 52 & 591.* 2. It is fit to mention the name of the justice, and his authority in the beginning of the *mittimus*, tho this is not always necessary, for the seal and subscription of the justice to the *mittimus* is sufficient warrant to the gaoler: *vide supra (**)* & *Dalt. 355 & 383. (b)*, for it may be supplied by averment, that it was done by the justice. 3. It must have a certain date of the year and day (*). 4. It should have an apt conclusion, namely to detain him till he be thence [123] deliverd by due course of law. *2 Co. Instit. ubi supra (+)*.

But altho it be true, that these things are regular and fit, namely the cause, the justice committing, the date, the apt conclusion, yet I am far from thinking the warrant void, that hath not all these circumstances.

And therefore the justification in false imprisonment against the gaoler may be good by virtue of such a warrant; and it seems to me, (contrary to the opinion of my lord Coke, *ubi supra*,) that if an escape be suffered willingly by the gaoler upon such a general warrant, it will be felony in him: *vide quæ supra, cap. 54. Part I. p. 609. De frangentibus prisonam (c)*.

And therefore if the conclusion of the *mittimus* be to detain him till further order by the justice, it is true it is an unapt conclusion, and therefore binds not up the hands of the justices, to whom it may belong, to bail or deliver him, as the case shall require; but the commitment is notwithstanding good, if there be any tolerable certainty in the body of the warrant for what it is, as for felony generally, tho the particular is best to be expressed.

(+) *Vide supra, p. 111.*

(**) *Part I. p. 577.*

(b) *New Edit. p. 575 & 593.*

(*) *Supra, p. 111.*

(+) *Vide Part I. p. 584.*

(c) *See also Part I. p. 595.*

3. Regularly the commitment is to be to the common gaol of the county, or if the offense be committed and the party taken within a franchise that hath a gaol, (as the *Gatehouse* at *Westminster*,) then to the gaol of the franchise, by the statute of 5 H. 4. cap. 10.

Only sometimes it hath been used by the justices of peace to send such prisoners, which are bailable and have not their bail ready, to some private prison, as the *New Prison* in *Middlesex* for some short time, till they can procure their bail: but this hath always been disliked by the justices of the king's bench and gaol-delivery as inconvenient, and not agreeable to the law (*d*).

4. If the prisoner be bailable, yet the justice is not bound to demand bail, but the prisoner is bound to tender it, otherwise the justice may commit him; *quod vide* 14 H. 7. 10. a. per [124] *Fineux*, accordingly adjudged *T. 40 Eliz. C. B. Collin's case*; and so of a sheriff, that hath taken a man by *capias*, where he is bailable.

Thus far touching commitment of an offender.

But in some cases the offender is neither discharged nor committed, but bailed, and that comes next to be considered.

But because the business of bail is large and various, I shall refer that to the next chapter.

Burn. Title Justices of the Peace.

(*d*) See the case of *Kendal and Roe*, *State Tr. Vol. IV. p. 862. & supra, Part I. p. 585. in natis.*

CHAP. XV.

Concerning bail and mainprise.

TOUCHING bailing of felons, &c. there will be these things inquirable. 1. What it is, and the nature and kinds of it. 2. In what cases it may be, and in what not. 3. By whom (*a*). 4. In what manner it is to be done, by writ or without writ (*b*). 5. The penalty of erring therein (*c*).

(*a*) *Infra, cap. 16. & sub fine cap. 17.*

(*b*) *Infra, cap. 17.*

(*c*) *Infra, sub fine hujus capituli.*

Touching

Touching the *first*, namely the nature of bail.

Bail and mainprise are used promiscuously oftentimes for the same thing, and indeed the words import much the same thing, for the former is *traditus J. S.* and the other is *manuaptus per J. S.*

But yet in a proper and legal sense they differ. 1. Always mainprise is a recognizance in the sum certain, but bail is not always so. 2. He, that is deliverd *per manucaptionem* only, is out of custody; but he that is bailed, is in supposition of law still in custody, and the parties that take him to bail are in law his keepers, and may re-seize him to bring him *in*; and therefore if a man be let to mainprise, suppose in the king's bench, an appeal or other suit cannot be brought against him as *in custodi marescalli*; but if he be let to bail, he is in supposition of law still *in custodia marescalli*, 33 E. 3. Mainprise 12. 36 E. 3. *Ibidem* 13. 32 H. 6. 4. a. Protection 13. and accordingly the books of 21 H. 7. 20. b. *per Fineux*, and [125] 9 E. 4. 2. a. that seem to differ, are to be understood. 3. Tho sometimes the recognizances themselves both in bail and mainprise are in sums certain, as shall be shewn, yet the entry on record in the one case is *deliberatur per manucaptionem*, and in the other case *traditur in ballium*.

But now for the kinds of bail properly so called, it is of these kinds.

1. Sometimes it is in no sum certain at all, but *traditur in ballium* to J. S. and this is the usual form in all bails in civil actions in the king's bench; and antiently it was so also in criminal cases, tho now, as shall be shewn, it differs.

And of this kind was the antient form of that bail, which was *corpus pro corpore*, which now is rarely used in that form, and the reason why that is disused is, because there was antiently a loose opinion, that he, who was bail in this manner for a felon, was to be hanged, if he brought not in the principal to keep his day, 33 E. 3. Mainprise 12. but the truth is, all his punishment is to be fined for his default. *Crompt. Justice. f. 157. a.* 11 H. 6. 31. b.

And so in civil actions, where this kind of bail is sometimes in use, as appears 27 H. 8. 11 & 12. 21 H. 7. 20. b. the bail is amerced, if he have not the principal at the day.

2. Sometimes the bail is only a recognizance in a sum certain for the appearance of a felon, and this is usual, *viz.* the principal in double the sum; as for instance in 40*l.* or more, the sureties each
of

of them in 20*l.* a-piece *ad comparendum & standum recto in curiâ de latrocinio prædicto secundum legem, &c.* Dalt. cap. 114. p. 305. (a).

The sureties ought to be at least two men of ability, and their number and sufficiency and the sum of the recognizance is much in the discretion of him that is to take it, and therefore he may examine them upon oath; but how these are punishable that take insufficient bail, shall be said hereafter.

[126] The sureties *ad standum juri* doth import also, that he shall plead to the felony; and therefore before the statute of *Marlbridge*, cap. 28. (b), if the felon had stood upon his *privilegium clericale* and would not answer the felony, his bail had been amerced, which is remedied by that statute.

3. The third sort of bail is that, which is indeed the true and regular bail, which is not only a recognizance in a sum certain, but also a taking to bail, the true form whereof is contained in *Lambert's Justice*, Lib. I. cap. 23. p. 264. *Memorand' quod die, anno, &c. coram, &c. venerunt A. & B. & ceperunt in ballium J. S. captum & detentum pro suspicione cujusdam felonie usquæ proximam generalem gaolæ deliberationem in comitatu prædicto tenend', & assumpserunt, viz. quilibet eorum sub pœna 20*l.* de bonis & catallis, terris & tenementis eorum & cujuslibet eorum ad opus dicti domini regis levand', si prædictus J. S. ad eandem proximam gaolæ deliberationem non personalitèr comparebit coram justiciariis dicti domini regis ad dictam gaolam deliberand' assignatis ad respondendum dicto domino regi tunc & ibidem super præmissis, or super iis, quæ ad tunc & ibidem ipsi objicientur, or rather according to the antient form *ad standum recto de latrocinio prædicto secundum legem & consuetudinem regni Angliæ.* Dat. sub sigillis nostris, die, anno, &c. Vide F. N. B. 250. Crompt. 157. b.*

But the seal need not be, for he is a judge of record, only his hand simply subscribed, or subscribed *capt. & cognitus die & anno supra dicto coram Math. Hale.*

This is the form of a bail, where the principal is either an infant or in prison, and so absent; and thereupon a warrant issues under the hand and seal of him that takes the bail for his enlargement, called a *liberate*.

But if he be bailed by a justice of peace before commitment, or if committed and brought into the court of king's bench or sessions to

(a) *New Edit. cap. 166. p. 150.*

(b) *2 Co. Inst. p. 150.*

be bailed, then the party himself is also bound; and sometimes the recognizance is simple with a condition added for his appearance, and sometimes the condition is contained in the body of the recognizance, *ut supra*: Only it is to be remembered, that when any person is bailed for any misdemeanor either upon the return of an *habeas corpus* or otherwise, the return or record ought to be [127] first filed, and a *committitur marescallo* entered, and then bail taken; for all persons, that are bailed in the king's bench, are *de facto*, or in supposition of law first supposed to be *in custodia marescalli*.

The advantage of this kind of bail is this, that it is not only a recognizance in a sum certain, but also a real bail, and they are his keepers, and may be punished by fine beyond the sum mentioned in the recognizance, if there be cause, and may re-seize the prisoner, if they doubt his escape, and bring him before the justice or court, and he shall be committed, and so the bail be discharged of his recognizance. 36 E. 3. *Mainprise* 13. 32 E. 3. *Mainprise* 23. *Crompt. Justice*, f. 157. a.

Touching the *second*, in what cases a person is bailable, that is accused or indicted of felony or accessory, or in relation thereunto.

I shall not meddle with bailing of prisoners in civil actions or for offenses less than felony by acts of parliament, only thus much.

Regularly in all offenses either against the common law or acts of parliament, that are below felony, the offender is bailable, unless,
1. He hath had judgment. 2. Or that by some particular or special act of parliament bail is ousted.

What acts of parliament oust bail in particular offenses against those acts is not my purpose to declare, they are very well collected by Mr. *Dalton*, cap. 114. (c), and Mr. *Crompton de pace regis*, f. 154. b. & *sequentibus*.

In relation to capital offenses there are especially these acts of parliament, that are the common land-marks touching offenses bailable or not bailable, viz. 3 E. 1. or *Westm.* 1. cap. 15. 34 E. 3. cap. 1. 23 H. 6. cap. 10. 1 R. 3. cap. 3. 3 H. 7. cap. 3. 1 & 2 P. & M. cap. 13. and 2 & 3 P. & M. cap. 10.

As to the statute of 3 E. 1. it declares, who are bailable and who not as well in other cases, as in cases capital.

But at that time few were concerned in bailing of prisoners, but the sheriff, in whose custody they most commonly were, and such subordinate officers, that either under the sheriff or as bailiffs of liberties had the custody of prisoners, [as appears from the words of the statute,] *Et pur ceo que viscounts & autres queux ont prise & retenus prisoners*: And therefore still the statute did not extend to courts of justice, much less to the court of king's bench: *vide 2 Co. Instit. p. 185, 186. super hoc statutum*; neither doth this statute singly of itself extend to justices of the peace, for they were not in being till 1 E. 3. and therefore the statute of 1 & 2 P. & M. cap. 13. especially makes this statute of 3 E. 1. a direction touching bailing of offenders.

And therefore it seems also upon the same reason the statute of 27 E. 1. cap. 3. *de finibus levatis*, that directs and authorizeth justices of gaol-delivery to inquire of sheriffs and others, that have let out of prison by replevyng persons not replevifable, or have offended against the statute of *Westminster*, and to punish them according to that statute, extends not to courts or justices of the peace, but only to sheriffs and subordinate officers.

And the truth is, it could not be well applicable to any but them, for as all writs of *homine replegiando*, *de manucaptione*, & *de odio & atia* were directed to the sheriffs, so in most cases what was to be done in those times for bailing of prisoners was most commonly to be done by the sheriff.

This statute declares, 1. Who were notailable by the common law. 2. Who from thenceforth should not beailable; and 3. Who should beailable, and inflicts punishment upon sheriffs and bailiffs bailing those that are not replevifable, and not bailing those that are replevifable.

And this act extends not only to such bailments as might be *virtute officii*, but also to bailments by force of the common writ *de homine replegiando* or *de manucaptione*; whereof hereafter.

My lord *Coke* in his comment upon this chapter (*d*) hath given us the substance and intent of this statute, which I shall therefore but in effect transcribe.

[129] I. As to those that were irreplevifable at common law, I mean before the statute of 3 E. 1. (for possibly more anti-ently all offenders were replevifable), they are of four sorts.

1. *For the death of a man.*

(*d*) 2 Co. Instit. p. 186, & seq.

At

At this time there was held little difference between murder and manslaughter, but only in degree; for till 23 *H.* 8. clergy was allowable in the one as well as in the other, nay, at this day, if the indictment run only *interfecit & murdravit* without *ex malitiâ præcogitatâ*, the prisoner hath clergy.

And as to the point of *bail* no difference was at common law, nor after the statute of 3 *E.* 1. till later statutes (*de quibus infra*), between murder, manslaughter, or the killing of a man *se defendendo*, or *per infortunium*, for they, that could not bail in murder, regularly could not bail in the other three cases.

And this held universally as to bailment by the sheriff or by the justices of peace; but as to others, it had some exceptions.

The court of king's bench might and still may bail in any case whatsoever, even in high treason or murder, for the court is held in law *coram ipso rege.* 4 *Co. Instit.* p. 71. 2 *Co. Instit.* p. 186. but this is in the discretion of the court, and none can challenge it *de jure.*

And this bailment in the king's bench may be upon an original indictment before them in the county where they sit, or upon an indictment removed by *certiorari*, or upon a prisoner removed by *habeas corpus* before or after an indictment taken; *vide infra.*

In some cases justices of gaol-delivery may bail in case of the death of a man.

1. If a man be found guilty of a death *se defendendo*, or *per infortunium* upon his trial, the justices of gaol-delivery may certify the matter into *chancery*, that the party may sue his pardon of course, and in the mean time bail him till the next sessions. 3 *E.* 3. *Coron.* 361.

And the same law it is, if the coroner's inquest only find it *se defendendo*, such inquisition shewing the special matter, as [130] it ought, is good, *Stamf. P. C. cap. 7. f. 15. b. 26 Eliz. Holmes's case, Crompt. de pace, f. 153. b. & 28. a.* and the reason of the book of 12 *E.* 3. cited by *Crompton*, that in an indictment before the coroner *se defendendo*, the words *se defendendo* were void and stricken out, is not because they were against the king, but because they were too general.

2 *Co. Instit. super stat. Glouc. cap. 9. p. 316.* an indictment *se defendendo* is good before justices of gaol-delivery, but it is there said it is not good before justices of peace; *de quo supra, p. 45.* and therefore upon such an indictment before the coroner *se defendendo* specially, the justices of gaol-delivery may bail the party till the next sessions to

procure his pardon of course, as well as if it had been found upon his trial; and so it was done 26 *Eliz.* in *Holmes's* case, *Crompt.* 153. *b.* *vide Ap-Rice's* case, 19 *H.* 7. *Kelw.* 53. *a.* *Crompt.* *ibidem.*

2. If a man be convicted of manslaughter, and hath a pardon to plead, which the justices of gaol-delivery see in the interval of the session, they may bail him, (notwithstanding his conviction and that of manslaughter), to another session to plead his pardon. 2 *E.* 6. *B.* *Mainprise* 94. *Crompt.* 153 *b.*

3. If a person be brought before the judges of gaol-delivery upon suspicion of murder, but before commitment or indictment [it appears] upon examination of the fact by the justices of gaol-delivery, that he is not guilty, (tho in truth a felony were committed), the justices of gaol-delivery may bail him to another sessions: *vide* 31 *Eliz.* in case *de Salford*, *Crompt.* 154. *a.*

But I am not of the mind that the same judge [*Shuttleworth*] was of that if he be convicted upon a trial against the opinion of the judge, that he can bail him to sue his pardon; but all he may do is to reprieve him before judgment, and certify for him for a pardon.

And therefore it seems to me there is no difference between this case and that of *Dyer* 179. *a.* where a man is convicted, and it [131] is doubted whether he be within clergy, yet he remaineth notailable.

4. If a man be indicted of murder at the sessions of gaol-delivery, and prays his trial, but the prosecutor for the king is not ready with all his evidence, the judge may respite his trial till another sessions; and tho he be not bound to bail him, yet if he do find that it is no contrivance of the prisoner to surprise the prosecutor, but that it is merely the neglect of the prosecutor, or that his pretense is merely a delay to continue the party in prison, I have known it often practised at *Newgate*, and elsewhere, for the justices of gaol-delivery to bail the prisoner till another sessions, if it be far off, and upon circumstances considered.

And yet in none of these cases neither justices of peace nor sheriff can bail; but how far they may bail in cases of manslaughter shall be said hereafter, when we consider the subsequent statutes.

And thus far at present for bailing in case of the death of a man.

2. The *second* case where a man was notailable by the common law, is, where a man is taken *per mandatum domini regis*: this is not intended of the personal command of the king, for regularly as the king

king cannot in person arrest or imprison, so he cannot command another to imprison, but it must be done by some order, writ, or precept, or process of some of his courts. 16 H. 6. *Monstrauns de fait* 132. 1 H. 7. 4. b. 2 Co. *Instit. super statutum Westminst.* 1 cap. 15. p. 187.

Nay, altho such a mandate be by commission under the great seal, it is void, 42 Affiz. 5. therefore the *præceptum*, or *mandatum domini regis* in this act, is intended of the process of law issuing out of the king's courts according to their several jurisdictions, 2 Co. *Instit. super Mag. Chart.* cap. 29. and *Westm.* 1. cap. 15. But if intended of the king's personal command, tho such a person so taken be notailable by the common writ *de homine replegiando*, yet he isailable by the court of king's bench or chancery upon an *habeas corpus*; *de quo infra*, 2 Co. *Instit.* p. 55. 187.

3. *Thirdly, Or of the justices, viz.* by writ of process [132] issuing according to law within their several jurisdictions; for altho these wereailable in many cases by the courts that issued the process, yet they were notailable by the common writ *de homine replegiando*, but are excepted therein, nor by the sheriff *virtute officii* till the statute of 23 H. 6. cap. 10.

4. *Fourthly, Or for the Forest*; persons imprisoned by the justice in eyre in the forest, are not repleviable by the common writ *de homine replegiando*.

II. The second part of this statute is enacting or declarative who are notailable; but so far as this statute looks, it only concerns the sheriff and bailiffs, and the common writs of *homine replegiando*, or *de manucaptione*, which are directed to the sheriff, tho afterwards it was made the rule in many things to justices of peace, &c. by the statutes of 1 & 2 P. & M. and 2 & 3 P. & M. *de quibus infra*.

And the cases wherein bail is restrained by this statute, are thirteen in number, some in respect of the heinousness and weight of the offense, as treason, burning of houses, breaking of prison, &c. and the rest upon the great evidence and probability of guilt, as persons outlawed, &c. but I shall follow them in the order that the statute sets them down.

1. Persons outlawed; for outlawry is an attainder of felony, and [the outlaw] is presumed guilty, because he withdraws himself from the process of law.

And upon the same reason it is, that a person convicted of felony, while the judge adviseth upon his clergy, is notailable, because he is

convicted, *Dy. 179. a.* Nay, tho he be convicted against the direction of the court, he is notailable against the opinion of *Shuttleworth, 31 Eliz. Crompt. f. 154. a.*

And therefore if the ordinary had had a clerk convicted in his custody, if the ordinary let him to bail, he was punishable: *vide 15 H. 7. 9. a.*

But if a man be outlawed for felony, and be taken upon a *capias utlegatum*, and plead in avoidance of the outlawry against him that he is of another place, and so not the person outlawed, or bring a writ of error to reverse the outlawry and assign his errors, the court [133] of king's bench may bail him; and it is not unusual so to do, whether the outlawry be upon an appeal or an indictment.

If a man be indicted or appealed for such an offence, wherein bail may be taken, the indictment or appeal does not hinder his bailment, because it induceth no sufficient presumption of his guilt; if he wereailable before indictment, he isailable after, *2 Co. Instit. super stat. Westm. 1. cap. 15. and statutum ipsum F. N. B. 249. 22 Affiz. 94.* but not allowed till he hath pleaded to the indictment, *16 Affiz. 13. 29 Affiz. 44.*

But if a man be indicted before justices of a higher jurisdiction, as before justices of *oyer and terminer*, he cannot be bailed by justices of peace, for they cannot proceed upon an indictment taken before superior judges, tho otherwise the cause might be within their cognizance.

2. Persons that have abjured for felony, are notailable, for they are attainted in law.

3. Approvers in felony are notailable, because they do confess themselves guilty.

4. Persons taken with the *mainouvre* are notailable, because it is *furtum manifestum*.

But that is intended of the thief himself; for if *A.* steal goods, and sells them to *B.* and *B.* is taken with them, *B.* isailable.

5. Persons that being committed for felony break prison, are not to be bailed; for, 1. It carries a presumption of their guilt. 2. It is a superadded felony to the former, for which they stood committed.

6. Notorious thieves: and herein common fame, and other circumstances may be opposed against their bailing, unless they can shew reasonable evidence to prove their innocence. *16 E. 4. 5. a. b.*

7. Persons impeached and approved by an approver, because it induceth a strong suspicion that they are guilty, because the accuser confesseth himself guilty before he can impeach others. But

But this hath certain exceptions. 1. If the approver be dead. 2. If the approver hath waved his appeal. 3. If the person accused by the approver be of good fame.

8. Persons arrested for wilful burning of another man's house, which was a felony at common law.

9. Persons arrested for falsifying the king's coin.

10. Or for counterfeiting the king's great or privy seal.

11. He that is excommunicated by the ordinary, is notailable, unless it be for a temporal cause; and then upon a prohibition granted, he may not only be bailed but delivered; or upon an appeal and a special writ *de cautione admittendâ*, if not obeyed by the ordinary, a special writ may issue for his enlargement.

12. Or if he be imprisoned for some open misdeed, as if *A.* dangerously wounds *B.* he may be imprisoned till it be known whether the party will die or live; and regularly is not to be bailed, till it shall probably appear that the danger is over. 10 *H.* 7. 20. *a.* 3. *H.* 7. *cap.* 1.

13. Nor he that is arrested for treason, that toucheth the king, whether he be indicted or not; these are neitherailable by virtue of the common writ *de homine replegiando*, nor *ex officio* by the sheriff or bailiff of a liberty.

But all or any of these areailable by the court of king's bench. 2 *Co. Instit.* 189.

III. The third thing provided by this statute, is to declare who areailable by the sheriff, and they are of seven kinds.

1. Persons indicted before the sheriff for larceny, if they have not been accused of other felonies before, or as the writ of the regifter, *f.* 83. *b.* 268. *b.* styles them, if they are of good fame.

This therefore lies very much in the discretion and true information of the sheriff, or other justices that commit them.

2. Persons imprisoned for a light suspicion, *dum tamen fuerint bonæ famæ.*

3. Persons indicted for petit larceny.

4. Persons accused for receiving of felons.

5. Or of commandment, force, or aid to the felony done.

These two last concern accessaries *after* and *before*, where-
in there is some diversity of opinion in our books. [135]

Regularly in all cases of felony, tho it be murder, the accessary isailable till the principal be attaint, and this holds as well in cases of

the death of a man as other felonies, 40 E. 3. 42. a. 40 Affiz. 8. But if the principal be once attaint, and then the accessory is taken, he shall not be bailed until he hath pleaded to the indictment; but after plea pleaded by him, he shall be bailed, notwithstanding the attainder of the principal, tho it be in case of murder. 43 E. 3. 17. b. 50 E. 3. 15. a. 27 Affiz. 10. 47 Affiz. 16.

6. Or indicted or accused for an offense, for which he ought not to lose life or member, unless in cases of offenses against acts of parliament, where the acts of parliament exclude bail.

7. Or appeal'd by an approver, who is since dead.

These be the cases wherein by *that* act the party is bailable.

And therefore though a party be committed, and the tenor of the *mittimus* be to detain him without bail or mainprise, yet if the offense be by law bailable, he that hath the power of bailing may bail him. *Crompt. de Pace* 153. a.

This statute adds a penalty, 1. For bailing a person not bailable; if he be a sheriff, constable, or bailiff of fee, he shall lose his office; and if he be an under-bailiff, or not a bailiff of fee, he shall have three years imprisonment, and be fined at the king's pleasure. 2. And if he shall detain persons repleviable after surety offered, he shall be grievously amerced.

And thus far for the statute of 3 E. 1.

Burn. Tit. Bail per totum. Index to 2 Hawk. P. C. Tit. Bail. 4 Blackf. Com. ch. 22. Of Commitment and Bail, 296—300.

[136] CHAP. XVI.

Concerning the statutes of 34 E. 3. 1 R. 3. 3 H. 7. 1 & 2 P. & M. 2 & 3 P. & M. in relation to bailment of prisoners.

ANTIENTLY most of the business touching bailment of prisoners for felony or misdemeanors was performed by the sheriff or special bailiffs of liberties, either by writ, or *virtute officii*.

But when the offices of justices of peace were instituted by the statute of 1 E. 3. they gradually had the greater business of committing and bailing offenders devolved into their hands; and by successive acts of parliament,

1. The

1. The power of the sheriff grew out of use. 2. The justices of peace obtained most of the sheriff's power in relation to bailment. 3. Their power of bailment is in relation to offenses extended larger than the sheriff's, and in some kind larger than the limits prescribed by 3 E. 1. 4. Yet in some respects the sheriff's power as to bailing in offenses not capital was enlarged by the statute of 23 H. 6. cap. 10.

I shall therefore take these several statutes in order of time.

I. The statute of 34 E. 3. cap. 1. gave them power to apprehend malefactors, and to commit them to custody, or to bind them to their good behaviour, which was not intended perpetual, but in nature of bail, viz. to appear at such a day at their sessions, and in the mean time to be of good behaviour.

By the statute of 23 H. 6. cap. 10. there is not only power, but command to the sheriff to let out by sufficient sureties parties arrested in personal actions, and upon indictments of trespass, (except persons taken by *excommunicatio capiendo*, condemnation, judgment, execution, surety of the peace, or by commandment of the justices, or persons taken upon the statute of labourers), yet [137] their power of bailing of felons, &c. by the statute of 3 E. 1. continued.

II. By the statute of 1 R. 3. cap. 3. "Forasmuch as persons have
" been taken and imprisoned upon suspicion of felony, sometimes upon light suspicions, sometimes by malice, and detained without bail or mainprize, it is enacted, that every justice of peace within their limits
" have power to let such prisoners to bail, as if they had been indicted before them at their sessions, and shall have power to inquire of escapes."

This gave power to any one justice of peace to bail any prisoner for felony, and excepts not manslaughter, but withal supposeth, that before this act they could not bail till indictment in their sessions; but it seems was somewhat uncertain, for it was, *where they were committed for malice or light suspicions.*

III. The statute of 3 H. 7. cap. 3. reciting the statute of 1 R. 3. and that by colour thereof divers persons not mainpernable were let to bail, enacts, "That two justices of the peace, whereof one of the
" *quorum*, have power to let such persons as are mainpernable by law, to bail to the next sessions of the peace or gaol-delivery, and
" shall accordingly return the recognizance under pain of 10 l.

This statute seems, 1. To repeal the statute of 1 R. 3. as to bailing by one justice, and gives it to two justices, whereof one of the *quorum*. 2. It limits also the power of bailment only to such cases as are bailable by law; and therefore, it seems, takes in the statute of 3 E. 1. as the directory what persons are by law bailable. And thus it stood till 1 Mar.

IV. By the statute of 1 & 2 P. & M. cap. 13. these two things are principally enacted.

1. That whereas the statute of 3 H. 7. is general, that two justices shall let to bail such as are bailable by law, this statute in express words makes the statute of 3 E. 1. the standard for the taking of bail by two justices.

[138] 2. That any person arrested for manslaughter, or other felony bailable by law, or suspicion thereof, shall not be bailed but by two justices of peace, whereof one of the *quorum*, both to be present at the bailing of such offender, and to certify it in writing at the next gaol-delivery; but the justices of peace and coroner in London [and the county of *Middlesex*, and in other cities, boroughs, and towns corporate within their several jurisdictions] to do as formerly: justices of peace, &c. offending contrary to the true intent of this act, the justices of gaol-delivery may fine them.

V. The statute of 2 & 3 P. & M. cap. 10. only provides for examinations and informations to be taken by the justices of peace, as well upon commitment as bailing of any prisoner for manslaughter, or other felony.

Upon these statutes, and that of 3 E. 1. which expressly saith, "That for the death of a man (*) a person is not bailable by law," it hath been questiond, whether justices of peace may bail in case of manslaughter.

On the one side, the statutes of 2 Mar. and 3 Mar. expressly admit that they may, and accordingly the usual practice hath been: *vide Lamb. Justice, p. 25. & sequentibus.*

On the other side, these things make against their bailing, *viz.* 1. The statute of *Westm.* 1. [3 E. 1.] cap. 15. recites expressly, that for the death of a man the offender is not by law bailable, and the very statute of 1 & 2 P. & M. refers to the statute of 3 E. 1. as the rule and standard for justices of peace to proceed by, in case of bailing.

(*) *Vide Glanvil, Lib. xiv. cap. 1 & 3.*

2. Again, the statute of *Gloucester, cap. 9.* (+) expressly provides, “ That he that kills a man by misadventure, shall remain in prison “ till the coming of the justices in eyre or gaol-delivery, and then he “ shall be tried;” and if in case of a death by *infortunium*, much more in case of a simple manslaughter.

3. The writ of *homine replegiando* excepts the case of the death of a man from bail.

4. It was resolved by all the judges of *England, 7 Car. 1.* that a man is notailable for manslaughter, as I had it from the book of the late chief justice *Hyde*, who accordingly did set a fine of 20*l.* upon a learned reader, being a justice of peace, and [139] now an antient serjeant at law for bailing a man in case of manslaughter in the county of *Salop*, which I knew to be true; and this was approved by most of the judges that heard it.

To settle this business therefore I say,

1. That in case of murder it is of all hands agreed, that the justices of peace cannot bail, but it is to be done regularly only in the king's bench.

2. That in case of manslaughter, if the fact be apparent by plain proof or confession that a man is kild, and kild by *J. S.* whether the same were done *ex malitiâ præcogitatâ*, or upon a sudden falling out, or but *se defendendo*, yet a justice of peace, or two justices, whereof one of the *quorum* cannot bail by any law in force.

3. That whether it do *constare de personâ occidentis*, or *de modo occidendi*, or not, yet if the party be indicted of manslaughter, nay tho it were but *se defendendo*, the justices of peace cannot bail.

4. But if there be a manslaughter committed, and it is certainly no more, and a party suspected is brought before two justices of the peace, whereof one is of the *quorum*, if the matter be doubtful and uncertain, whether this be the person that did the fact, the two justices of peace, whereof one is of the *quorum*, may bail *that* man, and that by virtue of the statute of 1 *R. 3. cap. 3.* which gave power to one justice of peace generally to bail any person suspect of felony, if it appear to him to be a light suspicion, (whereof he must needs be the judge), which doubtless extended to manslaughter; and altho the statute of 3 *H. 7. cap. 3.* transfers that power to two justices of peace, whereof one of the *quorum*, yet still it was bottomed upon the statute

(+) 2 *Co. Instit. p. 315.*

of 1 R. 3. and the statute of 1 & 2 P. & M. is bottomed upon that of 3 H. 7.

Again, the statute even of *Westminster* 1. [*viz.* 3 E. 1.] tho it say *de morte hominis*, there is no bail at common law, yet it must be intended, when the offender is certainly known, for it generally provides, that persons taken upon a light suspicion shall be bailed; and therefore the statute of 1 & 2 P. & M. when it makes the [140] statute of *Westminster* 1. the standard of their proceeding in point of bailment, and yet supposeth one taken for manslaughter bailable, must mean such a manslaughter, where the party is [only] suspected, not where the thing is done [by him]; for the words *bailable by law*, do not only refer to *felony*, which is the last antecedent, but *manslaughter*: and by this construction, all the statutes, and all parts of the statutes stand together (e).

(e) Since our author wrote there has been another very material statute in relation to bailment, *viz.* 31 Car. 2. cap. 2. commonly called the *habeas corpus* act. By this statute, §. 7. "If any person committed for high treason or felony shall pray or petition in open court the first week of the term, or first day of the sessions of *oyer and terminer*, or general gaol-delivery, to be brought to his trial, and shall not be indicted some time in the next term or sessions after such commitment, the court is required upon motion made the last day of the term or sessions, to set at liberty such prisoner upon bail, unless it appears to the court upon oath made, that the witnesses for the king could not be produced the

same term or sessions. And if any person so committed having made his prayer or petition as aforesaid, shall not be indicted and tried the second term or sessions after his commitment, or upon his trial, shall be acquitted, he shall be discharged from his imprisonment.

This act (which is related by bishop Burnet in his history of his own times, Vol. I. p. 485. to have passed the house of lords in a very remarkable manner,) is generally esteemed the great bulwark of *English* liberty, altho upon some important occasions it has been thought proper, as to treason, to suspend it for a time. See 6 Ann. cap. 15. 1 Geo. 1. cap. 8. & cap. 30. 9 Geo. 1. cap. 1.

C H A P. XVII.

Concerning the fourth general, namely, the various manner of bailing prisoners.

THE fourth thing comes to be considered, namely, the different manner of bailing of malefactors.

And this is of two kinds.

First, By writ.

Secondly, *Ex officio* without a writ.

And

And, *first*, Concerning bail by writ.

And these are of four kinds. 1. *Homine replegiando*. 2. *Breve de manucaptione*. 3. *Habeas corpus*. 4. *De odio & atia*.

I. The writ of *homine replegiando* lies for any person imprisond for a misdemeanor, wherein by the law he isailable; and therefore in the writ there is an exception of the death of a man, persons imprisond by the command of the king or his justices, or for offenses of the forest, *vel pro aliquo alio recto, quare secundum consuetudinem Angliæ non sit replegiabilis*. *F. N. B.* 66. *f*.

But tho offenses in the forest are excepted, yet a special writ of *homine replegiando* lies for one taken by the ministers of the forest (*nota*, not by the chief justice) *F. N. B.* 67. *a*.

So that this writ as to the point of bailing is founded upon the statute of *Westm.* 1. *cap.* 15. or at least governed by it, only in the statute there the exception is of persons taken by [command of] *the Justices*, here it is *capitalis justiciarii*.

By this writ the sheriff is to deliver the party by mainprise; and if he returns, that *J. S.* makes title to the person imprisond, either as his villain or ward, &c. he is to take sureties of the party imprisond to appear in the king's bench or common-pleas, and to take bail of him for his appearance at the day, and to attach *J. S.* to appear at the same day, &c. where the business may be determind; and if *J. S.* be returned *non est inventus*, then a *capias in withernam* may be granted against him to take his body, and if a *non est inventus* be returned, a *withernam* to take his goods.

II. The writ of mainprise, and that is of two kinds, namely, 1. The general original writ *de manucaptione*. 2. Special writs of mainprise, both issuing out of the *Chancery*.

1. The general writs of mainprise are at large set down in the *Regist. f.* 268. & *seq.* and *F. N. B.* 250. & *sequentibus*, and these writs seem to be grounded or directed also by the statute of 3 *E.* 1. *cap.* 15. for *that* is the rule and direction whereby persons are to be bailed by this general writ; for no persons criminal areailable by this common writ of mainprise, for as such they areailable by that statute; and this common writ of mainprise respects either such as are committed by the sheriff or bailiff of a hundred, or such as, [142] tho they are in the sheriff's custody, are yet committed to his custody by others, as justices of the peace, &c.

1. As

1. As to those of the former kind, we must call to remembrance what hath been before said touching the power of the sheriff to take indictments of felony, either by commission or in his *Turn*.

The former power is repealed by the statute of 28 E. 3. cap. 9. As to the latter, though the power of taking indictments continues in the sheriff's *Turn*, yet by the statute of 1 E. 4. cap. 2. they are to send them to the justices of peace to be determined in their sessions; but the sheriff nor his bailiffs are not to arrest or attach any person thereupon; and the like law is for bailiffs of hundreds, who have a leet of the hundred or *Turn* accompanying it.

And therefore as to these, the writ of mainprise is consequentially taken away, according to my lord Coke, in his comment *super Westm. 1. cap. 15. 2 Instit. p. 190.*

But whereas it is there said, that *by that statute the writ of mainprise generally is taken away*, it is certainly mistaken, for the writ of mainprise hath still its use in cases of persons committed by the justices of peace, and some other cases, as shall be farther shewn.

2. The *second* sort therefore of these common writs of mainprise, were for such malefactors as were committed by others, if they were such as by the statute of *Westm. 1. cap. 15.* were bailable, and the writ of mainprise in this case continues in force and use to this day; as for instance, *F. N. B. 250. d.* for a person approved by an approver, if the approver is since dead; yet such a person can neither be taken by warrant of the sheriff or justice of peace, but by the coroner or justices of gaol-delivery.

F. N. B. 250. g. 251. c. for one indicted before the justices of peace for a trespass, *250. i.* for forestalling, *250. e.* as accessory to a felony, where the principal is not attainted.

Again, *F. N. B. 250. f.* for one taken by the king's commission for felony.

[143] And this is that writ that seems intended by the book of 14 H. 6. 8. a. where it is said, "That he that is taken by suggestion, as by justices of peace, &c. may be bailed without writ; but he that is taken by a writ, must be bailed by writ (*);" which seems intended of this writ of mainprise; and tho the saying be not universally true at this day, for some that are taken by process or writ may, at least at this day, be bailed *virtute officii*, especially upon the statute of 23 H. 6. cap. 10. & *Westm. 1. cap. 15.* yet it

(*) See our author's note *ad F. N. B. 66. c.*

sufficiently intimates, that the writ of mainprise was not taken away by 28 E. 3. cap. 9.

And thus far for the general writs of mainprise.

2. Special writs of mainprise were sometimes granted upon special occasions for those, that were notailable otherwise.

Thus it was usual in antient times by the king's special warrant, sometimes by special commission, sometimes by immediate writ out of *chancery* in times of war, to deliver persons in prison for felony upon mainprise to go into foreign parts in the king's wars, as *Gascoigne*, and elsewhere, at the king's wages, & *stabunt recto in curia*, after their return, *si quis versus eos loqui voluerit*, and upon the return of such manucaptions into the chancery to have charters of Pardon. See precedents of such commissions and writs, *Pat. 22 E. 1. m. 1.* to *Roger Brabazun*, and *William Brerford. Rot. Vascon. 22 E. 1. m. 8. n.º. 11.* & *m. 12. n.º. 4.* for malefactors imprisond in all the gaols in *England* for felony and other crimes *per manucaptionem deliberand'*; and the like was often practised upon like occasions in the reigns of other kings.

And thus far for writs of mainprise.

III. The third usual writ for bailing of criminals, is by *habeas corpus*, and this is a writ of a high nature; for if persons be wrongfully committed, they are to be discharged upon this writ returned; or ifailable, they are to be bailed; if notailable, they are to be committed.

This writ issues out of the great courts of *Westminster*, but hath different uses and effects.

1. It may issue out of the court of *Common-pleas* or *Exchequer*; but that is or ought to be always where a person is [144] privileged, or to charge him with an action.

If a person is sued in the common-pleas, or is supposed to be so sued, and is arrested for a pre-supposed misdemeanor, yea or for felony, an *habeas corpus* lies in the court of *Common-pleas* or *Exchequer*; and if it appears upon the return, that the party is wrongfully committed, or by one that hath not jurisdiction, or for a cause for which a man ought not to be imprisond, the privilege shall be allowd, and the person discharged from that imprisonment; or if it be doubtful, he may be bailed to appear in the court of *King's-bench*, which hath conusance of the crime returned. *Coke Magn. Cart. cap. 29. 2 Instit. p. 55.*

And

And upon this account, *P. 43 Eliz. C. B.* in the case of *Bates* that was imprisond by the council-table, for not bringing in his subscription to the *East-India* company, and this being returned upon the *habeas corpus*, together with a writ against him out of the common-bench, they adjudged the privilege to be allowd, and the party to be discharged (a).

But if a man be sued in the common-bench, and is arrested and imprisond for felony, tho the gaoler, upon the *habeas corpus*, ought to return the causes, as well criminal as that wherewith he is charged out of that court, yet the court of common-pleas ought not to commit him to the *Fleet*, nor discharge him of the imprisonment, nor yet to take bail of him to answer there, for they have not conuſance of ſuch crimes; the like it is, if he be returned committed for a riot or ſurety of the peace by juſtices of peace; and therefore all they can do is to take his appearance, and take him to mainpriſe upon the action, and remand him as to the matter of crime, for which he was well committed by the juſtices, and to remand his body to the ſheriff's cuſtody upon his commitment for the crime. 2 *H. 7. 2. a.*

But now by the ſtatute of 16 *Car. 1. caſt. 10.* they have an original juriſdiction to bail, diſcharge, or commit upon an *habeas corpus* [145] for one committed by the council-table, as well as the king's bench, and that altho there be no privilege for the perſon committed.

2. As to the *King's-bench* and *Chancery*, they have an original power both to grant an *habeas corpus*, and to bail, or diſcharge, or remand, as the caſe requires, tho there be no privilege returned. *Coke on Mag. Cart. cap. 29. 2 Inſtit. p. 55.* but ſome things they differ in.

The *king's bench* in matters civil grant their *habeas corpus ad faciendum & recipiendum*, and this is done as well in vacation as term, and returnable before any particular judge of that court, or into the court itſelf.

And if there be returned even upon that writ any civil action, and alſo a matter of crime, as if a perſon be arreſted for debt, and alſo charged with a warrant of a juſtice of peace for felony; in that caſe, 1. If it appears to the judge or court, that the arreſt for debt or other

(a) See *Moor* 838. & ſeq.

civil action is fraudulent, they may remand him. *Dyer* 249. *b.* *Harrison's* case. 2. If it be found real, they may commit him to the king's-bench with his causes, tho they are matters of crime, for that court hath conuſance, as well of the crime, as of the civil action; but then in the term the court may take his appearance or bail to the civil action, and remand him, if they ſee cauſe, as to the crime to be proceeded on below.

But upon the writ *ad faciendum & recipiendum* there ought not ſingly a matter of crime to be return'd, for that belongs to the *habeas corpus ad ſubjiciendum*.

The other writ is the *habeas corpus ad ſubjiciendum*, which is for matters only of crime, and is not regularly to iſſue nor be returnable but in the term-time, when the court may judge of the return, or bail, or diſcharge the priſoner (*b*).

TH

(*b*) By the ſtatute of 31 *Car.* 2. *cap.* 2. ſuch writ may iſſue in the vacation time on behalf of any perſon, who ſtands committed for any crime (unleſs for felony or treaſon plainly expreſt in the warrant of commitment, or as acceſſary before to any petit treaſon, or felony, or upon ſuſpicion thereof,) other than perſons convict or in execution; for by that ſtatute it is provided, “ That if any ſuch perſon, or any one on
“ his behalf, complain to the lord chancellor, or lord keeper, or any one of his
“ majeſty's juſtices either of the one bench
“ or of the other, or the barons of the exchequer of the degree of the coif, and the
“ ſaid lord chancellor, &c. or any of them,
“ upon view of the copy of the warrant of
“ commitment or detainer, or otherwiſe
“ upon oath made, that ſuch copy was denied to be given by ſuch perſon in whole
“ cuſtody the priſoner is detained, are
“ hereby authorized and required under
“ the penalty of 500*l.* upon requeſt made
“ in writing by ſuch perſon or any on his
“ behalf, atteſted and ſubſcribed by two
“ witneſſes, who were preſent at the delivery of the ſame, to award an *habeas corpus* under the ſeal of ſuch court,
“ whereof he ſhall then be one of the
“ judges, to be directed to the officer in
“ whole cuſtody the party ſo committed
“ or detained ſhall be, returnable immediately
“ before the ſaid lord chancellor or ſuch
“ juſtice, &c. and upon ſervice thereof, as
“ aforeſaid, the officer or his under officer
“ ſhall (within three days after ſuch ſervice,
“ if not beyond the diſtance of twenty
“ miles, or ten days, if above twenty
“ miles, and not beyond the diſtance of an
“ hundred miles, or twenty days, if above

“ the diſtance of one hundred miles), under
“ the penalty of 100*l.* bring ſuch priſoner
“ before the ſaid lord chancellor or ſuch
“ juſtice, &c. before whom the ſaid writ
“ is made returnable, and in caſe of his
“ abſence before any other of them, with
“ the return of ſuch writ and the true
“ cauſes of the commitment and detainer,
“ and thereupon, within two days after the
“ party ſhall be brought before them, the
“ ſaid lord chancellor, &c. before whom
“ the priſoner ſhall be brought, as aforeſaid, ſhall diſcharge him from his imprisonment, taking his recognizance with
“ one or more ſureties in any ſum according to their diſcretions, having regard to
“ the quality of the priſoner, and nature of
“ the offence, for his appearance in the
“ court of king's bench the term following,
“ or at the next aſſizes, &c. or in ſuch
“ other court, where the ſaid offence is
“ properly cognizable, as the caſe ſhall require, and then ſhall certify the ſaid writ
“ with the return thereof, and the ſaid recognizances into the ſaid court, unleſs
“ it ſhall appear unto the ſaid lord chancellor, &c. that the party ſo committed is
“ detained upon a legal proceſs, order, or
“ warrant out of ſome court, that hath jurisdiction of criminal matters, or by
“ ſome warrant ſigned and ſealed with the
“ hand and ſeal of any of the ſaid juſtices,
“ or barons, or ſome juſtice of the peace
“ for ſuch matters or offences, for which by
“ law the priſoner is not bailable.

“ No perſon to be intitled to the benefit
“ hereof, unleſs he firſt pay, or cauſe to be
“ paid or tendered the charges of bringing,
“ to be aſcertained by the judge or court
“ that awarded the writ, and indorſed
“ thereon,

Till the return filed the court may remand him, after it is filed the court is either to discharge, or bail, or commit him, as the nature of the cause requires.

[147] If together with the *habeas corpus* there issues a *certiorari* to remove the indictment, yet in case of felony, tho the body and record be returned and filed, the court may remand him and the record by the statute of 6 *H. 8. cap. 6.* but in other cases the record cannot be remanded, but they must proceed in the king's bench both to pleading, trial, and judgment.

But if the body be removed by *habeas corpus*, and the record also by *certiorari*, but the record not filed, tho the return upon the *habeas corpus* be filed, a *procedendo* may issue to the court below.

And thus far for the *habeas corpus* in the king's bench.

By virtue of the statute of *Magna Charta*, and by the very common law, an *habeas corpus* in criminal causes may issue out of the *Chancery*. *Coke on Magna Charta, cap. 29. 2 Instit. p. 55.*

But it seems regularly this should issue out of this court in the vacation time, but out of the king's bench in the term-time, as in case of a *superfedeas* upon a prohibition. 38 *E. 3. 14. a. B. Superfedeas 13.*

When the cause is returned, the chancellor may judge of the sufficiency or insufficiency thereof, and may discharge or bail the prisoner to appear in the king's bench, or may *propriis manibus* deliver the record into the king's bench, together with the body, and thereupon the court of king's bench may proceed to bail, discharge, or commit the prisoner.

But if the chancellor shall not discharge him, but bail him, this surety must be to appear in the king's bench; or if the chancellor shall

“thereon, not exceeding 12*d.* per mile,
“and give security by his own bond to pay
“the charges of carrying back, if remanded
“by the court or judge, and that he will
“not make any escape by the way.

Is is further provided by this statute,
“That no person set at large upon any
“*habeas corpus* shall be re-committed for
“the same offense, but by order of court
“having jurisdiction of the cause; any per-
“son knowingly offending herein to for-
“feit 5*ool.*

“This writ to run into counties palatine
“and privileged places.

“That no subject of *England* be sent pri-
“soner into *Scotland*, or any places beyond
“the sea, either within or without his
“Majesty's dominions, under the penalty
“of a *ramunire*, except persons ordered

“to be transported, or offenders sent to be
“tried, where their offenses were com-
“mitted.

“That after the assizes proclaimed and
“during the continuance thereof no pri-
“soner be removed but before the judge
“of assize in open court, nor at any other
“time, but by *habeas corpus*, or other legal
“writ, except where the prisoner is de-
“livered to the constable, &c. to be carri-
“ed to the common gaol; or where any
“person is sent by order of any judge of
“assize, or justice of peace, to any com-
“mon workhouse or house of correction;
“or is removed from one place to another
“within the same county, in order for his
“trial or discharge in due course of Law;
“or in case of sudden fire, infection, or
“other necessity.”

do neither, it seems he may commit him to the *Fleet* till the term, and then he may be turned over to the king's bench, and there proceeded against, for the chancellor hath no power to proceed in criminal causes.

And if the *habeas corpus*, and also a *certiorari* be granted, returnable in *Chancery*, and the cause and body be returned there, they may be sent into the king's bench; if the body only be returned with his causes by *habeas corpus* into the *Chancery*, and delivered over into the king's bench, they may proceed to the determination of the return, and either by *procedendo* remand him, or grant a *certiorari* to certify the record also, and thereupon commit or bail the prisoner, [148] as there shall be cause.

But the sending an *habeas corpus ad faciendum & recipiendum* by the chancellor for persons arrested in civil causes, especially being in execution, is neither warrantable by law, nor antient usage, and particularly forbidden by the statute 2 *H. 5. cap. 2.* as to persons in execution.

And thus far of bailing by *habeas corpus*.

IV. Touching the writ *de odio & atia* for a man accused of manslaughter, in some places called a writ *de bono & malo* and *de ponendo ad ballium*, it is grounded upon the statute of *Magna Charta, cap. 26.* repealed by 28 *E. 3. cap. 9.* and revived again, as is supposed, by 42 *E. 3. cap. 1.* whereby all acts made against *Magna Charta* are repealed. It is a writ much out of use, but the whole learning concerning it is put together by my lord *Coke* upon *Magna Charta, cap. 26. 2 Instit. p. 42.* and upon *cap. 29. 2 Instit. p. 55.* and thither I shall refer myself.

It has been disused by reason of the great trouble in the attaining and execution of it, for, 1. There must be a writ to inquire *de vita & membris.* 2. There must be an inquisition taken. 3. He was to be bailed by twelve persons.

And now the justices of gaol-delivery usually going their circuits twice a year, unless in the four northern counties, a prisoner comes to his trial as soon, if not sooner, than such inquisition and mainprise can be taken.

And thus far of manucaption or bail by writ.

The *second* general is bailing *virtute officii.*

The court of king's bench may *virtute officii* bail any person brought before them, of what nature soever the crime is, even for treason or murder, as hath been before shewn, *p. 129.*

Concerning bailment of felons by justices of the gaol-delivery and of the peace *virtute officii*, and the statutes relating to them, enough hath been said before.

The sheriff, it seems, might *ex officio* without writ at common law bail offenders indicted before him in his *Turn*, or upon a commission [149] to him; but this power is in effect taken away from him in cases of felony, by the statutes of 28 E. 3. cap. 9. and by the statute of 1 E. 4. cap. 1. and 1 R. 3. cap. 3. transferred to the justices of the peace, as hath been before declared.

The marshal of the king's bench took upon him antiently *virtute officii* to bail persons indicted or appealed; but this is wholly taken from him by the statute of 5 E. 3. cap. 8.

3-Wilson. 172. 188.

C H A P. XVIII.

Concerning warrants to search for stolen goods, and seizing of them.

I THOUGHT fit to insert this business in this place. 1. Because it is a business preparatory to the discovery of felons, and preparing evidence against them, and to the helping of persons robbed to their goods. 2. Because it is found by experience of great use and necessity, especially in these times, where felonies and robberies are so frequent. And therefore this means of discovering of them is now grown common and usual, much more than in antient times; and if it should be disused or discountenanced, it would be of public inconvenience; and therefore I can by no means subscribe to that opinion of my lord *Coke's*, 4 *Instit. cap. 31. p. 176.* as it is there generally set down, "That justices of peace have no power upon a bare surmise to break open any man's house to search for a felon or stolen goods either in the day or night." (c).

The moderation and temperaments that are to be added to these warrants, are these:

[I. Touching the granting thereof.]

(c) *Vide supra, p. 79, § 107.*

1. They

1. They are not to be granted without oath made before the justice of a felony committed, and that the party complaining hath probable cause to suspect they are in such a house or place, and do shew his reasons of such suspicion.

And therefore I do take it, that a general warrant to search in all suspected places is not good, but only to search in such particular places, where the party assigns before the justice his suspicion and the probable cause thereof, for these warrants are judicial acts, and must be granted upon examination of the fact.

And therefore I take those general warrants dormant, which are made many times before any felony committed, are not justifiable, for it makes the party to be in effect the judge; and therefore searches made by pretense of such general warrants give no more power to the officer or party, than what they may do by law without them.

2. It is fit that such warrants to search do express, that search be made in the day-time, and tho I will not say they are unlawful without such restriction, yet they are very inconvenient without it, for many times, under pretense of searches made in the night, robberies and burglaries have been committed (*), and at best it creates great disturbance.

3. They ought to be directed to constables and other public officers, whereof the law takes notice, and not to private persons, tho it is fit the party complaining should be present and assistant, because he knows his goods.

4. It ought to command, that the goods found, together with the party in whose custody they are found, be brought before some justice of the peace, to the end that upon farther examination of the fact the goods and party, in whose custody they are found, may be disposed, as to law shall appertain.

And the reason is, tho the receiving of stolen goods doth not *ipso facto* make a man an accessory to felony, tho he know them to be stolen (†), yet he carries with it a great presumption, that the receiving of them was to aid the felon; and besides, by the [151] examination of the receiver evidence may be gotten to discover the felon.

(*) *Vide Part I. p. 553. Co. P. C. p. 64. Kel. 43.*

(†) But now by 3 & 4 W. & M. cap. 9. & 5 Ann. cap. 31. whoever knowingly

buys or receives stolen goods shall be taken as accessory to the felon. *Vide Part I. p. 620.*

II. Touching the execution of this warrant.

1. Whether the stolen goods are in the suspected house or not, the officer and his assistants in the day-time may enter *per ostia aperta* to make search, and it is justifiable by this warrant.

2. If the door be shut, and upon demand it be refused to be opened by them within, if the stolen goods be in the house, the officer may break open the door, and neither the officer nor the party that comes in his assistance are punishable for it, but may justify it upon the general issue by the statute of 7 *Jac. cap. 5.* so that *in eventu* it is justifiable by both, for it is a process for the king, and includes a *non omitas*, and the very having of the goods carries a sufficient ground *primâ facie* of suspicion, that he was the felon that stole them, and may be thereupon justifiably arrested.

3. If the goods be not in the house, yet it seems the officer is excused that breaks open the door to search, because he searcheth by warrant, and could not know whether the goods were there till search made; but it seems the party that made the suggestion is punishable in such case, for as to him the breaking of the door is *in eventu* lawful or unlawful, *viz.* lawful, if the goods are there; unlawful, if not there.

III. Now upon the return of this warrant executed, the justice, before whom it is returned, hath these things to do:

1. As touching the goods brought before him, if it appears they were not stolen, they are to be restored to the possessor; if it appears they were stolen, they are not to be delivered to the proprietor, but deposited in the hand of the sheriff or constable, to the end the party robbed may proceed by indicting and convicting the offender to have restitution.

2. As touching the party, that had the custody of the goods.

If they were not stolen, then he is to be discharged.

If stolen, but not by him, but by another that sold or delivered them [152] to him, if it appears that he was ignorant that they were stolen, he may be discharged as an offender, and bound over to give evidence as a witness against him that sold them; if it appears he was knowing they were stolen, it is fit to bind him over to answer the felony, for there is a probable cause of suspicion, at least that he was accessory *after*.

Burn. Title Search-warrant, per tot.

C H A P. XIX.

Concerning Presentments, Inquisitions, and Indictments, and their kinds.

I HAVE gone through those matters, that are preparatory to the proceeding against malefactors in the several courts, wherein their offenses are punishable, namely, the arrest and imprisonment, or bailing of offenders, and the several jurisdictions, and justices, and ministers of justice concerned therein.

That which follows to be considered is the manner of bringing the offender to his legal trial and judgment, which is either by appeal, which is the suit of the party, or by indictment which is immediately the king's suit.

The former of these, namely appeals, I shall consider after the business of indictments, because it is but rare to have an appeal, and the most prosecutions of this nature are by indictment or presentment, and therefore I shall consider this first.

I shall distribute this matter into these general heads, namely, 1. Touching indictments and presentments. 2. Process. 3. Arraignment. 4. Pleas of the offender. 5. Trial. 6. Judgment. 7. Execution. Each of which will take in several particular heads and distributions.

Presentment is a more comprehensive term than *indictment*, for regularly an indictment is an accusation given *in* against a person by the grand inquest for some misdemeanor whereunto he is put to answer; but presentments do not only include such indict- [153] ments, but also some other informations whereunto the party is not put to answer, as presentments of *felo de se*, of *fugam fecit*, of deodands, of deaths *per infortunium*, and many others.

In this title concerning presentments and indictments I shall consider these points. 1. The several kinds of presentments and indictments. 2. Where a man shall be put to answer in criminals without indictment. 3. Who may be indicters, and how returned. 4. Of what they may inquire. 5. What the penalty of not inquiring or presenting. 6. What formalities are required in indictments.

First, Touching the several kinds of presentments, inquisitions and indictments in matters capital.

They may be distinguished, 1. In relation to the courts or judicatories, or jurisdictions, where they are made.

And, 2. In respect of their effects or natures.

I. Touching the former branch of distribution in relation to the jurisdictions where made, and *that* multiplies presentments or indictments according to the jurisdictions, as some are in the leet, some in the sheriff's *Turn*, some before the coroner, some before justices of peace, justices of *oyer* and *terminer*, gaol-delivery, king's bench, whereof enough before hath been said, and shall not need here to be repeated.

But those, that most concern capital offenses, are such as are taken before the coroner, or such as are taken before justices by commission, whereof more shall be said in the ensuing chapters.

II. As to the second kind of distribution in respect of the nature and effect thereof.

1. Some presentments are of themselves convictions, and not traversable.

2. Others are not convictions, but only in nature of informations, and therefore traversable.

Regularly all presentments or indictments before justices of the peace, *oyer* and *terminer*, gaol-delivery, &c. are traversable, and conclude not the party or those claiming under him.

[154] And therefore, tho it hath been held, that the presentment of a *felo de se* before the coroner be not traversable, (*de quo supra*,) yet of all hands it is agreed, that a presentment of a *felo de se* before justices of peace or *oyer* and *terminer* is traversable by the executors, &c. *Co. P. C. cap. 8. p. 55. H. 37 Eliz. B. R. Laughton's case.*

If a presentment be made *super visum corporis*, that *A.* kild *B.* and fled, this presentment of the flight is held not traversable, but conclusive to forfeit the goods, tho he be after acquitted of the felony, and expressly found by the petty jury upon his trial, that *non se retraxit (d)*, 13 *H. 4. 13. b. Forfeiture 32. 3 E. 3. Forfeiture 35. 7 Eliz. Dy. 238. b.* And the same law is, if it be found *super visum corporis*, that the felon fled and was kild in the flight, this present-

(d) *Vide supra, p. 63, 64.*

ment, tho after the party's death, is conclusive as to the forfeiture for the flight. 3 E. 3. *Coron.* 289, 290. 312.

But if before justices assigned to hear and determine, it be presented, that J. S. committed a felony and fled; or if upon the arraignment of a person for felony he be found not guilty, and that he fled, this is but in nature of an inquest of office, and the flight is traversable in an action, or information, or *scire facias* brought by the king for the goods of the person; 37 *Affiz.* 7. 47 E. 3. 26. a. And all the reason, that can be given why the coroner's inquest of a *fugam fecit* is conclusive, and not the other, is only that which is given 8 E. 4. 4. a. *Ceo est un ancient positif ley del coron'*.

If a man be presented to have suffered an escape, because in this case the party is at least to be fined, he shall have his traverse to it, and is not concluded by it.

But if either before the justices in *eyre*, or before the coroner, an escape be presented upon a vill either before or after the arrest, this is held not to be traversable, because there is only an amercement to be set upon the vill, *viz. villata in misericordia*; and the reason given by *Stamford* is, *quia de minimis non curat lex*; *Stamf. P. C. Lib. I. cap. 32. f. 35. b.*

But if it fall out, that there be an indictment for such an escape, (as there hath been been formerly against the city of *London* for the escape of those that riotously kild Dr. *Lamb* (e), who were [155] thereupon fined 2000*l.*) such an indictment is not conclusive, but traversable.

Whether an inquisition of a *felo de se* before the coroner be traversable, *vide quæ supra, Part I. cap. 31. p. 414.*

And there are no presentments besides what are before mentioned, that are in themselves convictions and not traversable, but a presentment in a leet of bloodshed or the like, and in the *Swanimote* court of the forest for offenses of *Vert* and *Venison*.

But even those presentments are traversable also in two cases, *viz.*
1. If the offense presented be out of their jurisdiction. 2. Or if the presentments be such as concerns the freehold, as presentments of nuisances, or such matters as charge the freehold; 41 E. 3. 26. b. 45 E. 3. 8. b.

And therefore it was resolved in the *Exchequer* in a *quo warranto* against the water-bailiff and conservator of the river *Severn*, 22 Car. 2.

(d) *Cro. Car.* 252.

that upon a bare presentment the conservators cannot set a fine upon a supposed unlawful fishing or the like, unless the party comes *in* and confesses it, or pleads to it, and be convicted by a jury of the offense.

A presentment of a riot or forcible detainer by a justice or two justices of peace, as the case shall require, is a conviction by the statute of 15 R. 2. cap. 2. 8 H. 6. cap. 9. 13 H. 4. cap. 7.

But a presentment by a justice of a default in repairs of an highway, tho by the statute of 5 Eliz. cap. 13. it is such a presentment as the parties shall be put to answer, yet it is not conclusive, but the traverse of the party is saved by the statute; and it is but reason, for tho the view of the justice can ascertain the decay or want of repairs, yet it cannot ascertain in what parish it lies, or who is bound by tenure or prescription to repair.

Burn. Titles. Indictment & Presentment. 4 Blackf. Com. ch. 23. p. 301, 302—307.
Index to 2 Hawk. P. C. tit. Indictment. Presentment.

[156] C H A P. XX.

Where a man shall be put to answer in criminal and capital offenses without indictment at the king's suit.

AT the common law there were several means of putting the party to answer a felony without any indictment, some whereof are still in force, others are taken away by statute.

I. If a thief or robber were taken with the *mainouvre*, *cum manu opere*, and the *mainouvre* brought into court with the prisoner, he should have been arraigned upon the *mainouvre* at the king's suit; 2 E. 3. Coron. 156. And therefore M. 18 & 19 E. 1. coram rege, rot. 28. Norf. *Et quia prædictus Johannes de Brampton [falsarius sigilli regis & brevium suorum, ut dicitur,] non est appellatus, nec indictatus, nec captus cum manu opere, per quod secula domino regi in hujusmodi casu potest competere, ideo [consideratum est, quod] prædictus Johannes [eat inde] sine die, &c.*

And T. 10 E. 2. rot. 132. Bucks, Robert Legat was arraigned for counterfeiting the king's seal, upon the counterfeit commission brought

brought into court without indictment, and he pleaded not guilty, and was acquit (*).

But upon a bare information or bill, without indictment or the *mainouvre* at common law, no party was to be put to answer for a felony; and therefore, *M. 20 & 21 E. 1. coram rege, rot. 27. Hibernia, William Prene*, the king's carpenter in Ireland, being accused for felony by a bill in the king's-bench there, and convicted and condemned, but after ransomed for 200*l.* and a writ of error brought in the king's-bench in *England*, and assigned, that he ought not to be put to answer in case of life or member *per vocem & per billam, quam Nigellus le Broun, porrexit versùs ipsum, licèt non esset indictatus per 12. (f).* [149*]

But it seems to me, that this proceeding upon the *mainouvre* is wholly taken away by the statutes of 25 *E. 3. cap. 4.* 28 *E. 3. cap. 3.* 42 *E. 3. cap. 3.* and therefore I do not find any proceeding upon the *mainouvre* since these statutes.

II. A second sort of proceeding in cases capital without indictment is, where an appeal is brought at the suit of the party, and the plaintiff is nonsuit upon that appeal, yet the offender shall be arraigned at the king's suit upon such appeal; and so it is in case the appellant die or release; and in such case, altho the party be indicted as well as appeald, yet upon the nonsuit of the plaintiff, the proceeding for the king shall not be upon the indictment, but upon the appeal. 4 *E. 4. 10. a.*

But this hath these two qualifications.

1. It must be where the plaintiff in the appeal hath either declared upon his appeal by writ, or formed his appeal by bill, for the bare suing of a writ without a declaration is not such an appeal as, the party being nonsuit, the defendant shall be thereupon arraigned; for

(*) *Vide Part I. p 186 & 349.*

(f) That case was thus: *William Prene* assigned for error that "par ceo que le commune laie de Engleterre, e de Ireland, veut, ke nul homme par bille faunz enditement, ou par sute de apel, suz les plez de corone, ne fait [soit] attache, ne mis en respounz; yet that he the said *William* had been imprisond, & de diversis felonis accusatus par une bille par *Nel le Broun* bote en mayns des justices; altho par enquest, ne par chapiter, ne fut endite." And upon consideration of the whole matter the court of king's-bench in *England* were of opi-

nion, "Quod prædictum recordum est irritandum, & adnichilandum; & ideo mandatum est capitali justic' *Hibernie*, quòd corrigat, &c. & accepta securitate de prædicto *Willielmo* ad standum recte in com' ubi deliquisse debuit, & vocatis super hoc convocandis ponat prædictum *Willielmum* per apertum & manifestum indictmentum de certis felonis in certis locis, si aliquis vel aliqui eum forte indictare sive appellare voluerit secundum legem & consuetudinem regni, &c. & quòd interim per manucaptionem bona & catella, terras & tenementa, eidem *Willielmo* deliberet, &c.

1. The writ may be brought in his name by a stranger without his privity. 2. Because the writ alone contains not such certainty of time, place, and other matters, whereby the party may be put to answer. 7 *H.* 7. 6. *b.*

2. It must be where an appeal is well begun, and by a party enabled to prosecute it, therefore, if the appeal abates, because a plaintiff is outlawed, or a woman (who cannot bring an appeal, but only of the death of her husband,) or if the year and day be past, [150*] or by the misnomer of the defendant, &c. there the appellee shall not be arraigned at the king's suit, because the appeal was never good, but shall be dismissed, only the judges may arraign him upon an indictment, if any be before them for that offense, or if none be, yet they may bind him over to another sessions, and in the mean time to be of good behaviour; 19 *E.* 2. *Coron.* 317. All the learning touching this business is fully declared by *Stamf. Lib.* III. *cap.* 59. *f.* 147. & *sequentibus.*

III. A third sort is upon an appeal by an approver, but the whole learning touching that will come in its proper place hereafter (*g*).

IV. The fourth sort is by appeals by particular persons, especially of treason in parliament; and this was very frequent in antient times, especially in the time of *R.* 2. namely *anno septimo, undecimo & duodecimo*, which bred great inconveniencies.

And therefore by the statute of 1 *H.* 4. *cap.* 14. all these kinds of appeals in parliament are wholly taken away; and since that time I find not any such appeals brought in parliament.

And therefore, when the now earl of *Bristol*, in this present parliament, in the lords house preferred articles of high-treason and other misdemeanors against the earl of *Clarendon*, then lord chancellor, upon a reference unto all the judges, and upon great consideration the judges *unâ voce* returned their opinion, that these articles were contrary to the statute of 1 *H.* 4. and could not be preferred in the lords house by the said earl, or any other private person (*h*).

But impeachments by the house of commons of high treason, or other misdemeanors in the lords house have been frequently in practice, notwithstanding the statute of 1 *H.* 4. and are neither within

(*g*) *Vide infra, cap.* 29. *p.* 226.

(*h*) See *Stat. Tr.* Vol. II. *p.* 550.

the words nor intent of that statute, for it is a presentment by the most solemn grand inquest of the whole kingdom.

V. If in a civil action *de uxore raptâ cum bonis viri*, upon not guilty pleaded, the defendant be convicted, this antiently served in nature of an indictment of felony, 13 *Affiz.* 6. 18 *E.* 3. 32. *a.* *Stamf. P. C. f.* 94. *b.* So if upon a special verdict in trespass brought in the king's-bench, it be found, that the defendant took them feloniously, antiently this served for an indictment. 31 *E.* 1. *Enditement* 31. [151*]

So if in an action of slander for calling a man thief, the defendant justifies that he stole goods, and issue thereupon taken, it be found for the defendant, if this be in the king's-bench, and for a felony in the same county where the court sits, or if it be before justices of assize, who have also a commission of gaol-delivery, he shall be forthwith arraigned upon this verdict as on an indictment, and the reason is, because here is a verdict of twelve men in these cases, and so the verdict, tho in a civil action, serves the king's suit as an indictment, and is not contrary to the acts of 25, 28, & 42 *E.* 3. which enact, *that no man shall be put to answer, &c. but upon indictment or presentment.*

But if the sheriff returns a rescue of a prisoner taken for felony, 1 *H.* 7. 6. *a.* or a breach of prison by one arrested for felony, 2 *E.* 3. 1. *b.* this is not sufficient to arraign the party, nor doth it countervail an indictment, for it is not by the oath of twelve men; *vide hoc totum, Stamf. P. C. Lib. II. cap. 29. f.* 95. *a.*

By the statute of 11 *H.* 7. *cap.* 3. there was power given to proceed upon all penal statutes by information before justices of assize and peace, but there is an exception of all cases of treason, murder and felony.

Ill use was made of this statute by *Empson* and *Dudley*, and great inconvenience and trouble to the people did arise by it, and therefore by 1 *H.* 8. *cap.* 6. it was repealed.

And tho informations are practised oftentimes in the crown-office in cases criminal, and by many penal statutes the prosecution upon them is by the acts themselves limited to be by *bill, plaint, information* or *indictment*, yet thus much is observable.

1. That the method of prosecution of *capital* offenses is still to be by indictment, except the cases above mentioned.

2. That

2. That in all criminal causes the most regular and safe way, and most consonant to the statutes of *Magna Carta*, cap. 29. 5 E. 3. cap. 9. 25 E. 3. cap. 4. 28 E. 3. cap. 3. & 42 E. 3. cap. 3. is by presentment or indictment of twelve sworn men.

[152*]

C H A P. XXI.

Who may be indictors, and where and how returned.

INQUISITIONS, presentments, or indictments are taken before courts, or officers of several kinds, and accordingly by acts of parliament several things are prescribed touching them.

I. Touching inquests before coroners: By the statute of 4 E. 1. *De officio coronatoris*, the coroner is to issue his precept to four, five or six vills to appear before him at a certain day to make inquiry, this precept is directed to the constables of the vills, who accordingly give summons to a competent number of inquirers, twelve at least (i), and by them the inquisition is made, when they have been sworn and have heard their evidence upon oath taken before the coroner.

II. Touching inquests of felonies in leets and *Turns*. By the statute of *Westminster* 2. cap. 13. indictments in the sheriffs *Turns* are to be by twelve at least, and they are to set their seals to the inquisitions, otherwise they are void (k).

And by the statute of 1 E. 3. cap. 17. which extends as well to leets as *Turns*, they are to be by indenture, one part to remain with the indictors, the other with the sheriff or steward.

And by the statute of 1 R. 3. cap. 4. no person shall be returned upon a pannel in the sheriff's *Turns*, unless he hath 20s. *per ann.* of freehold, or 26s. 8d. of copyhold, and all indictments in the *Turn* taken otherwise shall be void.

But now by the statute of 1 E. 4. cap. 2. the sheriff cannot proceed upon any indictments for felony, or otherwise taken in his *Turn*, but must send them to the sessions of the peace, and the justices there are to make process and proceed thereupon.

(i) *Cobar's case supra*, p. 161. in notis.(k) 2 Co. *Instit.* p. 387.

But

But then there must be care taken, 1. That the indictments be of such matters only, as are within the jurisdiction of the sheriff's *Turn*, otherwise the justices may not proceed upon them, 4 E. 4. 31 a. 8 E. 4. 5. b. (*) and 2. That they be by indenture, and under the seals of the presenters, according to the [153*] former statutes.

III. Indictments taken in the county of *Lancaster* before the sheriff or justices against any person inhabiting out of the same county, or taken in any other county against inhabitants of the county of *Lancaster*, ought to be by twelve men, and each indictor to have lands or tenements of the yearly value of 5*l.* by the statute of 33 H. 6. cap. 2. (†).

IV. Touching murders, &c. committed in the king's palace, the statute of 33 H. 8. cap. 12. hath appointed, that twenty-four of the king's yeomen officers of the cheque-roll of the king's house shall be returned to make inquiry, and the trial to be by a jury of the gentlemen officers.

V. Concerning inquiries to be made before justices itinerant, the course was this: There first went out the writ of the common summons of the *eyre*, directed to the sheriff to summon *de quolibet villâ quatuor homines & præpositum, & de quolibet burgo duodecim legales burgenses*, to be at the day and place for the *eyre*, and upon that day the sheriff and lords of liberties were to return the names of the bailiffs of their hundreds and liberties, and those bailiffs were sworn to elect two men in their several hundreds, and present their names to the court, and these two hundreders for each hundred were to choose of themselves, and the rest of their several hundreders respectively, ordinarily sixteen, or sometimes only twelve, who were severally sworn upon inquiries and presentments of things done within their hundred, as so many grand inquests for every several hundred, and the twelve returned for each borough were the grand inquest for the borough; this caused a vast and chargeable attendance upon the courts in *eyre*, and hath been long disused, and therefore I shall not say more of it.

VI. Concerning the choosing and returning of the grand jury before justices assigned to keep the peace, *oyer* and *terminer*, and gaol-delivery, I shall be somewhat more large; because, before these justices, ordinarily, criminal and capital causes are heard and determined.

(*) *Vide supra*, p. 71.

(†) *Part I.* p. 286.

Upon the summons of any session of the peace, there goes out a precept either in the name of the king, or of two or more justices of peace, directed to the sheriff, that *non omittas propter aliquam libertatem in ballivâ tuâ, quin eam ingrediaris, & venire fac' tali die ac loco viginti quatuor liberos & legales homines de quolibet hundredo in ballivâ tuâ, tam infra libertates, quàm extra, ad faciendum & exequendum ea quæ ex parte domini regis tunc & ibidem eis injungantur,* and a *scire fac'* to all coroners, constables, and bailiffs, &c. to be there at that day. *Lamb. Lib. II. cap. 2.*

And according to others, *Venire fac' viginti quatuor liberos & legales homines de quolibet hundredo in ballivâ tuâ, quorum quilibet habeat 40s. per ann. liberi tenementi ad minus, venire fac' etiam viginti quatuor tam milites quàm alios probos & legales homines de corpore com' tui, quorum quilibet habeat 40s. de terris & tenementis liberi tenementi, ad inquirend' super iis, quæ ex parte domini regis ad tunc & ibidem eis injungerentur, præmunientes, omnes justiciarios ad pacem, constabularios, &c. Crompt. f. 212. a.*

And in cases of commissions of oyer and terminer, and gaol-delivery, *Quod non omittas propter aliquam libertatem, quin eam ingrediaris, & venire fac' tam viginti quatuor probos & legales homines de quolibet hundredo com' prædict', ad inquirendum, præsentandum, faciendum & exequendum ea omnia, quæ ex parte domini regis tunc & ibidem eis injungerentur, quàm alios viginti quatuor probos & legales homines de com' prædict' ad faciend' juratam inter dominum regem & prisiones prædictos, &c. Co. Entr. f. 55. a.*

Upon this precept the sheriff is to return twenty-four or more out of the whole county, namely, a considerable number out of every hundred, out of which the grand inquest at the sessions of the peace, oyer and terminer, or gaol-delivery, are taken and sworn *ad inquirendum pro domino rege & corpore comitatûs*, (not as antiently in eyre, a kind of grand inquest out of every hundred); but in some counties, which consist of gildable and such franchise, where anciently several justices of gaol-delivery sat, as in *Suffolk* (*), there are two grand juries, one for the gildable, another for the franchise, because there are two several commissions of gaol-delivery.

[155*] Now touching the grand jury thus returned before justices assigned, there are some things considerable.

(*) *Vide supra, p. 26.*

They must be *probi & legales homines*, and therefore if any one of the indictors be outlawd, tho in a personal action, it is a sufficient plea to avoid the indictment; 11 H. 4. 41 b. M. 4 Car. B. R. Croke, p. 134, Sir William Withipole's case, and the statute of 11 H. 4. cap. 9. hereafter mentioned fortifies this, *de quo infra*.

And therefore if any of them be attainted in a conspiracy, or *decies tantum*, or of perjury, or outlawd in any personal action, or attaind of felony, or in a *præmunire*, they are not to be indictors, because in law they are not *probi & legales*. Lamb. Jusfic. 391.

Touching their *annuus census*, I do not find any thing determined, but freeholders they ought to be. The statute of 2 H. 5. cap. 3. that requires jurors that pass upon the trial of a man's life, to have 40s. *per ann.* freehold, hath been the measure by which the freehold of grand jurymen hath been measured in precepts of summons of sessions (†).

By the statute of 11 H. 4. cap. ultimo, reciting, that inquests had been formerly returned of persons outlawd, fled to sanctuary for treason or felony, &c. enacts, "That no indictments be made by such persons, but by inquest of loyal subjects returned by the sheriffs or bailiffs duly, without denomination of any person, but only by the sworn bailiffs and ministers of the sheriff; and if any indictment be otherwise taken, it be void."

Upon this statute it hath been resolved in Sir William Withipole's case, above cited. 1. That it extends to coroners inquests. 2. It is a good plea upon this statute, that one of the indictors is outlawd in a personal action, as well as of felony, or that any of the jurors were impannell'd at the denomination of any, contrary to this statute.

By the statute of 3 H. 8. cap. 12. it is enacted, "That the justices of gaol-delivery, and justices of peace, whereof one of the *quorum*, in open sessions, may reform the pannels returned by the sheriff, (which be not at the suit of the parties), by putting to, and taking out the names of the persons returned, and shall [156*] command the sheriff to return the same accordingly, upon pain of 20l. and the king's pardon to be no bar to the prosecutor."

This act extends not only to pannels of grand inquests returned, but also to pannels of the petty jury, commonly called the jury of life and death, which may be reformed by the justices according to this act, and the sheriff is bound to return the pannel so reformed.

(†) *Vide infra*, p. 272. in notis.

The grand inquest returned the first day of the sessions, and sworn, commonly serves the whole sessions of the peace, *oyer* and *terminer*, or gaol delivery; yet the court may command another grand inquest to be returned and sworn, which is done ordinarily upon two occasions.

1. If before the end of the sessions, the grand jury having brought *in* all their bills, are discharged by the court, and after that discharge, either some new felony, or other misdemeanor is committed, and the party taken and brought into gaol; or if after the discharge of the grand inquest, some offender be taken and brought *in* during the sessions. In the former case, there is a necessity to make a special record of the adjournment of the sessions from day to day, because otherwise the whole sessions are in supposition of law only the first day, and therefore without the entry of such adjournment, the offense and proceedings will be, in supposition of law, after the sessions ended, and so the proceeding will be erroneous (*): this was the case of *Sampson (h)*, who being arraigned and tried for a murder committed after the first day of the sessions, and before the sessions ended, for want of entry of an adjournment it was ruled erroneous. And the same is to be observed, if upon record it appears, that the grand inquest was returned after the first day of the sessions, unless an adjournment be entered of record.

2. The second ordinary instance of a new grand jury returned, is upon the statute of 3 *H. 7. cap. 1.* namely, a grand inquest impanelled to inquire of the concealment of another grand inquest, upon which defaults presented, the former grand inquest is to be amerced; and this, tho it mentions only an inquest thus to be taken by justices of peace, yet it extends to the king's bench, and hath been [157*] practised there accordingly in my knowledge, and possibly at the sessions of *oyer* and *terminer* and gaol-delivery, tho that can rarely come in question, because the sessions of the peace ordinarily accompanies those commissions.

And this is the proper and legal way of punishing the grand inquest, if they refuse to present such things as are within their charge, and for which they have probable evidence to make a presentment; but of this more in the next chapter.

(*) *Supra*, p. 24.

(h) *W. Jones*, 420.

See Index to 2 *Hawk. P. C.* tit. Indictors.

CHAP. XXII.

Concerning the demeanor of the grand inquest, in relation to their presentments.

THE coroners inquest may, and must hear evidence of all hands, if it be offered to them, and that upon oath, because it is not so much an accusation or an indictment, as an inquisition or inquest of office, *quomodo J. S. ad mortem suam devenit*, tho it be also true, that the offender may be arraigned upon that presentment.

But the grand inquest before justices of peace, gaol-delivery, or *oyer* and *terminer*, ought only to hear the evidence for the king; and in case there be *probable* evidence (*a*), they ought to find the bill, because it is but an accusation, and the party is to be put upon his trial afterwards.

But if a bill of indictment for murder, or other capital offense be presented against *A.* if upon the hearing the king's evidence, or upon their own knowledge of the incredibility of the witnesses they are dissatisfied, they may return the bill *ignoramus*.

If *A.* be killed by *B.* so that it doth *constare de personâ occisi & occidentis*, and a bill of murder be presented to them, [158] regularly they ought to find the bill for murder, and not for manslaughter, or *se defendendo*, because otherwise offenses may be smothered without due trial; and when the party comes upon his trial, the whole fact will be examined before the court and the petty jury, and in many cases it is a great disadvantage to the party accused (*). For if a man kills *B.* in his own defence, or *per infortunium*, or possibly in executing the process of law upon an assault made upon him, or in his own defence upon the highway, or in defence of his house against those that come to rob him (in which three last cases it is neither felony nor forfeiture, but upon not guilty pleaded he ought to be acquitted), yet if the grand inquest find an *ignoramus* upon the bill,

(a) This same doctrine is laid down by C. J. Pemberton, in the case of the earl of Shaftsbury, *State Tr. Vol. III. p. 415.* Vide tamen Sir John Hawles remarks on that case, *State Tr. Vol. IV. p. 183.* wherein he unanswerably shews, that a grand jury ought to have the same persuasion of

the truth of the indictment, as a petit jury, or a coroner's inquest: *vide supra, p. 61.*

(*) Notwithstanding this, according to lord Coke, 9 Co. 119. *a.* indictments, which concern the life of a man, ought to be framed as near the truth as may be.

or find the special matter, whereby the prisoner is dismissed and discharged, he may nevertheless be indicted for murder seven years after.

But if the grand jury had found the bill for murder (yea or for manslaughter), and the party pleading not guilty, the special matter is given in evidence, and the petty jury find the special matter; (or in the three last cases find him not guilty, as they may) this acquittal upon this finding will be a good plea of *autrefois acquit*, and he shall never be arraigned for it again.

If a bill be against *A.* for murder, and the grand inquest upon the evidence before them, or their own knowledge be satisfied that it was but *per infortunium*, or *se defendendo*, and accordingly return the bill specially, the court may remand them to consider better of it, or may hear the evidence at the bar, and accordingly direct the grand inquest; but I have known a judge blamed for setting a fine upon the grand inquest for such a return, because in truth it comes not up to felony.

But if a bill goes out against *B.* for murder, and it doth *constare de personâ occidentis*, may the grand inquest find the bill for manslaughter, and *ignoramus* for the murder? and is the court bound to receive such a return?

[159] In this case, of all hands it is agreed (*b*), that the grand jury is to blame, because they take upon them to anticipate the evidence that is to be given to the petit jury, and so determine matter of law, which belongs to the court to determine, and by this means many murders may escape under the disguise of manslaughter, and so escape with their clergy.

Some therefore have made it a practice to set a fine upon the grand jury in this case, and it hath proceeded so far, as to fine petit juries also in such like cases; whereof hereafter.

That which I think herein, and in other concealments of grand inquests, is as follows, *viz.*

1. That the court may receive such a return from the grand inquest, and it is a matter of discretion, especially, if upon inquiry from the

(*b*) This is far from being agreed of all hands, for such an anticipation of the evidence by the grand jury is what they cannot avoid, they being bound by their oath as much as the petit jury, to *present the whole truth, and nothing but the truth*; nor do they in this case so properly determine matter of law as matter of fact; for whether murder or not depends upon a preconceived malice, which (tho it is to be presumed, where no provocation appears,) is matter of

fact, and proper for the consideration of a jury; and tho judges have sometimes fined jurors for not finding such bills for murder, yet such proceedings have been generally censured, as in the case of Sir H. Wyndham, and others, *P. 19. Car. 2.* who were fined by Keeling, C. J. for not finding a bill of murder, albeit they were satisfied the man died by the hand of the party indicted; but upon complaint in parliament, the chief justice was fain to submit. *2 Keb. 180.*

indictors

indictors or witnesses, or upon view of their examinations it doth plainly appear, that the crime amounts to no more.

2. That barely upon such a return no fine can be set upon the grand inquest, unless the evidence to the grand inquest be given at the bar in the presence of the court; for otherwise the court cannot understand, whether the grand inquest doth well or ill in such case.

3. That if the evidence to the grand inquest be given at the bar upon an indictment in the king's bench, and the grand inquest will not find a bill according to the direction of that court; as for instance, will find a man guilty only *se defendendo*, or of manslaughter, when it is murder, that court may set a fine upon the grand inquest, and so it hath been practised; for it is the highest court in *England* of ordinary justice, especially in criminal causes.

4. That if the justices of *oyer and terminer*, or gaol-delivery [160] having heard the evidence at the bar, the grand inquest will not find according to their directions, the justices may bind them over by recognizance into the king's bench, and upon an information against them they may be fined.

5. That in such a case justices of peace, *oyer and terminer*, or gaol-delivery may, according to the statute of 3 *H. 7. cap. 1.* impanel another inquest to inquire of their concealments, and thereupon set fines upon them.

6. But in my opinion fines set upon grand inquests by justices of the peace, *oyer and terminer*, or gaol-delivery for concealments or non-presentments in any other manner, are not warrantable by law; and tho the late practice hath been for such justices to set fines arbitrarily, yea not only upon grand inquests, but also upon the petit jury in criminal causes, if they find not according to their directions, it weighs not much with me for these reasons; 1. Because I have seen arbitrary practice still go from one thing to another, the fines set upon grand inquests began, then they set fines upon the petit juries for not finding according to the directions of the court; then afterwards the judges of *nisi prius* proceeded to fine jurors in civil causes, if they gave not a verdict according to direction even in points of fact; this was done by a judge of assize (*c*), in *Oxfordshire*, and the fine estreated; but I, by the advice of most of the judges of *England*, staid process upon that fine; the like was done by the same judge in a case of burglary, the fine was estreated into the *Exchequer*; but by like advice

(c) Justice *Hide* at *Oxford*. *Va'gb.* 145.

I stayed process; and in the case of *Wagstaff* (*d*), and other jurors fined at the *Old-Bailey*, for giving a verdict contrary to direction, by the advice of all the judges of *England* (only one dissenting), it was ruled to be against law: but of this hereafter (*e*). 2. My second reason is, because the statute of 3 *H. 7. cap. 1.* prescribes a way for their fining, which would not have been, if they had been arbitrarily subject to a fine before. 3. It is of very ill consequence, for the privilege of an *Englishman* is, that his life shall not be drawn in danger without due presentment or indictment, and this would be but a slender screen or safe-guard, if every justice of peace, or commissioner of *oyer and terminer*, or gaol-delivery, may make the grand jury present what he pleases, or otherwise fine them; and there is no parity of reason or example between inferior judges and the court of king's bench, which is the supreme ordinary court of justice in such cases; and thus far concerning fining of grand inquests (*f*).

They are sworn to keep the king's counsel undiscovered, the revealing or disclosing whereof was heretofore taken for felony, 27 *Ass. 63.* but that law is antiquated, it is now only fineable; if there be thirteen or more of the grand inquest, a presentment by less than twelve ought not to be; but if there be twelve assenting, tho some of the rest of their number dissent, it is a good presentment; for if twelve agree, it is not necessary for the rest to agree. *Lamb. Justice 400.*

But in case of a trial by the petit jury, it can be by no more nor less than twelve, and all assenting to the verdict (*g*), accordingly it was adjudged, *M. 42 E. 3. Rot. 16. Suff. Rex. (h)*, the judgment was reversed, because but eleven indictors.

But

(*d*) *Vaugh. 153.*

(*e*) *Cap 42.*

(*f*) The court of king's bench, it is true, may much more safely be trusted, than other inferior courts, but yet our author's arguments do sufficiently evince, that no court whatever ought to have such a power of making juries find what they please, nor has the law vested such a power in any court; for as to matter of fact, the jury are the sole judges, and herein are to be guided entirely by their own judgments and consciences; indeed in matters of law, the court is the proper judge, and the jury are not to find contrary to their direction; but even here they are not bound to follow the direction of the court, but if they cannot assent thereto, ought to find the fact specially; indeed where the fact is agreed, if they will obstinately find matter of law

contrary to the direction of the court, there may be some reason why they should be fined, See *Hood's case, Kelgn 50.* but barely finding matter of fact against the direction of the court, is no sufficient cause to fine a jury, *Busbell's case, Vaugh. 153.* and this distinction is founded on the ancient maxim of the common law; *ad quæstionem juris non respondent juratores, sed judices; ad quæstionem facti non respondent judices, sed juratores.* *Co. Lit. §. 366. & libros ibi.*

(*g*) See the inconveniencies hereof, *Pref. to State Tr. p. 7.*

(*h*) This case proves nothing as to the petit jury, it being an indictment on the coroner's inquest, as appears by the record, which is as follows: "*John Cobat of Ipswich*, was indicted by the coroner's inquest, consisting only of eleven, quod die "*Sabbati*

But if a presentment be delivered into a court of sessions, and received, no amercement lies, that it was not assented to by twelve, but otherwise it is in case of a presentment by a leet, for the party distrained, &c. may aver that it was not presented by twelve. 45 E. 3. 26. b. B. Leet 7.

The indictors are presumed in law to be indifferent, unless the contrary appear; 1. Because returned by the sheriff. 2. Because sworn by the court to present, and therefore shall never be charged by writ of conspiracy for any conspiracy before their being sworn, tho the party be acquit. 7 H. 4. 31. b. 19 H. 6. 19. a. But 21 E. 3. 17. by R. Th. it is a good replication to say, he procured himself to be returned of the grand inquest.

If a bill of indictment be for murder, and the grand jury return it *billa vera quoad* manslaughter, & *ignoramus quoad* murder, the usual course is in the presence of the grand jury to strike out *malitiose & ex malitiâ suâ præcogitatâ* and *murderavit*, and leave in so much as makes the bill to be but bare manslaughter, and so to receive it.

But the safest way is to deliver them a new bill for manslaughter, and they to indorse it generally *billa vera*; for the words of the indorsement make not the indictment, but only evidence the assent or dissent of the grand inquest, it is the bill itself is the indictment when affirmed. And so in like cases, where the bill contains two offenses, as burglary and theft, forcible entry and detainer. H. 4 Jac. B. R. Yelverton 99. Ford's case.

The grand jury are sworn *ad inquirendum pro corpore communitatis*, and therefore regularly they cannot enquire of a fact [163] done out of that country for which they are sworn, unless specially enabled by act of parliament, but only in some special cases. Mich. 9 Car. B. R. Bell's case.

" Sabbati prox' ante festum Sancti Petri ad
" vincula anno regni regis, E. 3. post con-
" questum tricesimo quinto insultum fecit
" Johanni le Swon servienti Prioris sanctæ
" Trinitat. Gippewici in suburbio libertat'
" villæ prædictæ in quodam campo juxta
" Tromons' Hegg & dictum Johannem le
" Swon ibidem cum quadam armâ vocat'
" Spartb' precii quatuor denar. verberavit
" felon' de quâ quidem verberatione dictus
" Johannes le Swon moriebatur, sed lan-
" guebat à dicto die Sabbati prox' ante fes-
" tum Sancti Petri ad vincula usque ad diem
" jovis tunc prox' sequent;" the which in-
" dictment was afterwards in Mich' term
" anno 42 of the same reign removed into the
" king's bench, " & continuato inde processu

" versus præfat' Johannem usque à die Pas-
" chæ in xv dies anno regni regis nunc
" Angliæ quadagesimo tertio, ad quem
" diem coram domino regi apud Westm'
" venit prædictus Johannes Cobat per man',
" & viso & diligenter examinato per cur'
" indictamento prædicto, pro eo quod
" compert, est in eodem, quod fuerunt nisi
" undecim juratores tantum in inquisitione
" prædictâ, ubi in qualibet inquisitione de
" jure fore deberent xii jurati, & sic vide-
" tur cur', quod indictamentum prædictum
" minus sufficiens est ad præfat' Johannem
" Cobat ulterius inde ponere responsur'.
" Ideo idem Johannes Cobat ad præsens eat
" inde sine die, salvo semper jure regis,
" &c."

If a man had been stricken in the county of *A.* and had died in the county of *B.* the offender had no been indictable of murder, &c. in the county of *A.* because the death was in the county of *B.* neither had he been indictable in the county of *B.* because the stroke was given in the county of *A.* but by the statute of 2 & 3 *E.* 6. *cap.* 24. he may be indicted in the county where the party died, tho the stroke were in another county; and also the offender shall be tried there, but an appeal may be brought in either county. 7 *Co. Rep.* 2. *a.* *Bulwer's* case.

So if *A.* had committed a felony in the county of *D.* and *B.* had been accessory *before* or *after* in the county of *C.* *B.* could not have been indicted as accessory in either county at common law, but by that statute he is indictable, and shall be tried in the county where he so became accessory. *Stamf. P. C. Lib.* I. *cap.* 46.

So if a stroke were given *super altum mare*, and the party came into the body of the county, and there died, this is *casus omissus*, and the party is neither indictable by the jury of the county where he died, nor before the admiral, by the statute of 28 *H.* 8. *cap.* 15. *Co. P. C. cap.* 7. *p.* 48.

If *A.* robs *B.* in the county of *C.* and carries the goods into the county of *D.* *A.* cannot be indicted of robbery in the county of *D.* because the robbery was in another county; but he may be indicted of larceny or theft in the county of *D.* because it is theft wherever he carries the goods; the like law in an appeal, 4 *H.* 7. 5 *b.* 7. *Co. Rep.* 2. *a.* *Bulwer's* case.

But by the force of some acts of parliament, treasons and felonies committed in one county may be indicted and tried in another county.

By the statute of 33 *H.* 8. *cap.* 23. upon examination, as in that
 [164] statute is provided, treasons, misprisions of treasons, and murders committed in any place within the king's dominions, or without, may be enquired of, heard and determined, in any county where the king by his commission shall appoint.

This statute, at least as to the trial of treasons and misprisions, is repealed by the statute of 1 & 2 *P. & M.* *cap.* 10. *Stamf. P. C. Lib.* II. *cap.* 26. *fol.* 89, 90. *Co. P. C. cap.* 2. *p.* 27.

But it seems *that* statute stands in force as to indictments and trials of murder, the circumstances required by that statute being observed.

By the statute 35 *H.* 8. *cap.* 2. because some doubt was conceived, whether foreign treasons committed out of this realm might be enquired of,

of, heard and determined within the realm, it is enacted, that such offences shall be enquired of, heard and determined in the king's bench, or in such counties where the king shall issue his commission by the good men of the same county.

This statute stands in force, not repealed by 1 & 2 P. & M. cap. 10. Co. P. C. cap. 2. p. 24.

By the statute 27 Eliz. cap. 2. treasons by priests or jesuits coming into *England*, and felony for receiving them; and by the statute 1 Jac. cap. 11. felony for taking a second husband or wife, the first living, are inquirable and determinable where the offender is apprehended; the like for felony in exportation of wools, by the statute of 14 Car. 2. cap. 18. But yet it was held at common law, that treason in adhering to the king's enemies beyond the sea, was inquirable and triable where the offender had lands, *vide Coke super Littleton, Sect. 440. p. 261. b. 5 R. 2. Trial 54.* but this is now settled by the statute of 35 H. 8. cap. 2 *vide Co. P. C. cap. 1. p. 11.*

If *A.* by reason of tenure of lands in the county of *B.* be bound to repair a bridge in the county of *C.* if the bridge be in decay, he may be indicted in the county of *C.* that he is bound *ratione tenuræ* of lands in the county of *B.* to repair the bridge. 5 H. 7. 3. 3 E. 3. *Affise* 446.

⁴ Blackf. Com. ch. 23. p. 303. Burn. tit. Jurors. Index to 2 Hawk P. C. tit. Jurors.

C H A P. XXIII.

[165]

Concerning the forms of indictments in cases capital, and first touching the form of the caption returned upon a certiorari.

IT will be a business of too much length, and besides my intention to treat of all indictments in cases of criminal, but I shall confine myself only to those that are capital.

Touching the forms of indictments, there are two things considerable: 1. The caption of the indictment: 2. The indictment itself.

The caption of the indictment is no part of the indictment itself, but it is the style or preamble, or return that is made from an inferior court to a superior, from whence a *certiorari* issues to remove; or when the whole record is made up in form, for whereas the record of

the indictment, as it stands upon the file in the court, wherein it is taken, is only thus: *Furatores pro domino rege super sacramentum suum præsentant*, when this comes to be returned upon a *certiorari* it is more full and explicate, viz. in this form:

Nortf. *Ad generalem sessionem pacis tent' apud S. in comit' prædicto 5 die Octobris anno regni, &c. 25 coram A. B. C. D. & sociis suis justiciariis domini regis ad pacem dicti domini regis in comit' prædict' conservand', necnon ad divers' felonias transgress' & alia malefacta in eodem comitat' audiend' & terminand' assignatis, per sacrament' E. F. G. H, &c. proborum & legalium hominum comit' prædict' jurat' & onerat' ad inquirend' pro dicto domino rege & pro corpore comit' prædict' existit præsentatum.*

[166] 1 First, The name of the county must be in the margin of the record, or repeated in the body of the caption.

2. The court where the presentment is made, must be expressed, viz. *ad generalem sessionem pacis, &c.* or *ad generalem goalæ regis deliberationem, &c.*

3. It must appear where the session was held, and that the place where it was held is within the extent of the commission, and therefore if *Dorset* be in the margin, and the caption be *ad generalem sessionem pacis tent' apud S.* and says not *in comitat' prædicto*, it is nought, *H. 42 Eliz. B. R. Ludlow's case, Croke, n. 10. p. 738. P. 40. Eliz. B. R. Croke, n. 4. p. 606. Child's case*; so if *west-riding in comit' Eborum* be in the margin, and caption be *apud S. in comit' prædicto*, it shall be quashed, because it doth not say *apud S. in west-riding in comitatu prædict* *T. 5 Jac. B. R. and P. 9. Jac. B. R. Thorny's case, Croke, n. 6. p. 276.*

4. The justices names, *H. 42 Eliz. B. R. Ludlow's case.*

But it is not necessary to name all the justices by name, but the rest may be supplied by the words (*& sociis suis, &c.*) But so many are fit to be named as are enabled by their commission to hold a session, and the return of the caption is supposed to agree with the title of their sessions.

5. The title of their authority, as *justic' ad goallem domini regis com' prædict' deliberand'.*

And note, that if there be a session by three commissions, as of gaol-delivery, oyer and terminer, and the peace, if it be returned at a session

session holden before them, and the record be made up, as upon all three commissions, if they have jurisdiction to take the indictment but by one of those, it is good, tho not enabled to take it by the other. 9 H. 7. 9. a.

Tent' coram justiciariis ad pacem, without saying *necnon ad divers' felonias, &c. audiend' & terminand' assignatis*, is not good to remove an indictment because tho that clause be usually added to all commissions of the peace, yet there are not thereby justices of *oyer and terminer*, and that clause ought to be added to their return, because without that clause they cannot proceed by indictment. 22 E. 4. 12. b. 2 R. 3. 9. a. b.

And altho in all commissions of *oyer and terminer*, gaol-delivery, and of the peace, there be some that are of the *quorum*, without which there can be no session held, yet in the caption there need not be any mention, whether any of them, or which of them are of the *quorum*, but generally as before, for it is sufficient, if *de facto* the session be held before him or them that are of the *quorum*, tho not so mentiond in the return, and so is the usual course. [167]

But it seems, that if an act of parliament doth expressly limit, that such or such an offense shall be heard and determined before two or more justices of the peace, &c. whereof one to be of the *quorum*, the caption of such an indictment of such an offense ought to mention, whereof A. &c. is of the *quorum*, as is used in the return of orders made by two justices touching bastard children upon the statute of 18 Eliz. cap. 3. because the act of parliament precisely limits one to be of the *quorum*, and therefore must be pursued.

6. It must return, that the indictment was made *per sacramentum*.

7. It must name the jurors that presented the offense, and therefore a return of an indictment or presentment *per sacramentum* A. B. C. & D. & *aliorum* is not good, for it may be the presentment was by a less number than twelve, in which case it is not good. H. 41 Eliz. B. R. Croke, n. 16. Clyncard's case, p. 654. and it seems to me, that all the names of the jurors ought to be returned; for the party indicted may have an exception to some or one of them, as that he is outlawed, in which case the indictment may be quashed by plea, tho there be twelve besides without exception; for possibly that one, who is not *legalis homo*, may influence all the rest, and so vitiate the whole indictment.

8. They

8. They must be returned to be *probi & legales homines*, and *de comitatū prædicto*, and this holds as well in the case of the coroner's inquest, as of other indictments or presentments. *P. 20 Jac. B. R. Croke 2. Oily's case, p. 635.*

9. It seems requisite also to add this clause, *onerati & jurati ad inquirendum pro domino rege & pro corpore comit' prædict'*; and if it be
 [168] a presentment by the grand jury of a liberty, *ad inquirend' pro domino rege & pro libertate de S. vel rapā de S.*

10. If it concludes *qui dicunt*, and says not *super sacrament'*, &c. or *præsentatum existit*, and says not *per sacramentum*, &c. *præsentatum existit*, it shall be quashed, for their presentment must be upon oath, and so returned; so ruled *T. 23 Car. 1. B. R.*

And thus far for the caption of the indictment, where, *note 1.* That if the caption be faulty in the form, yet the same term it may be amended by the clerk of the assises, or the peace, but not in another term.

2. But in another term, the clerk that returns it shall be fined for his informal return.

CHAP. XXIV.

Concerning the body of the indictment in cases capital, and the several parts thereof, and the forms requisite therein.

THIS is a large and uncertain title, and hard to be reduced to any certain orders; 1. Because the parts of an indictment are many. 2. The strictness required in indictments is great, because life is in question. 3. Therefore very nice and slender exceptions have been of latter ages allowd, and they have been with too much facility quashed and reversed. 4. The circumstances of facts and crimes are very various.

Yet I shall endeavour to reduce this title to as much certainty, and as good a method as I can, confining myself to capital causes, tho there be many things that will arise equally applicable to causes of an inferior nature.

[169] An indictment is nothing else but a plain, brief, and certain narrative of an offense committed by any person, and
 of

of those necessary circumstances, that concur to ascertain the fact and its nature; and therefore I shall consider 1. Some generals, that concern indictments in general. 2. I shall consider the several parts of indictments in their order.

Among these generals these will come to be considered, that follow.

I. Regularly, every indictment ought to be in *Latin*, as all pleadings in the courts of law ought to be, and it is of excellent use, because it being a fixed, regular language, it is not capable of so many changes and alterations, as happen in vulgar languages. (a)

If there be a proper *Latin* word for any offense or thing contained in an indictment, it may not be supplied with general words, and an *Anglicè*,

Therefore an indictment, *quòd exercuit quasdam diabolicis artes, Anglicè* witchcraft, was quashed, because there is a proper *Latin* word for it; *viz. Incantatio. M. 2 Car. B. Dr. Lamb's case. (b)*

Regularly, false *Latin* doth not vitiate an indictment, if yet the indictment be reasonably intelligible, 5 *Co. Rep.* 121. a. *Long's case, M. 30 & 31 Eliz. Croke, n. 3. B. R. Brickett's case, (c), as præfata reginæ*, where it should be *præfata*.

But if the words be words of art, and by omission or misplacing of letters become insignificant, they vitiate the indictment, as *burgariter* for *burglariter*, *feloniter* for *felonicè*, *murdredavit* for *murdravit*; but *burgulariter* hath been held good, 4 *Co. Rep.* 39. b. *Brook's case, ibid. 41. b. Haydon's case, 5 Co. Rep.* 121. a. *Long's case. H. 45 Eliz. B. R. Croke, n. 15. Ryle's case. (d)*

So if it make the indictment insensible or uncertain; as if *A. and B.* be indicted for stealing, *felonicè cepit & asportavit*, [170] where it should be *ceperunt*, it shall be quashed, *P. 42 Eliz. B. R. Lane's case (e)*; so in an indictment of murder, the stroke laid in *sinistro bracio*, where it ought to be *brachio*, for it appears not where the wound was, the words being insensible. *T. 31 Eliz. B. R. Webster's case. (f)*

(a) This is now altered by 4 *Geo. 2. cap. 26. 6 Geo. 2. cap. 6.* which requires all indictments, &c. to be in the *English* tongue; for notwithstanding the excellency of the use here mentioned by our author, it was thought to be of much greater use and importance, that they should be in a language capable of being known and understood by the parties concerned, whose

lives and liberties were to be affected thereby.

(b) *Noy 85. Latch. 156. W. Jones 143.*

(c) *Cro. Eliz. 108.*

(d) *Cro. Eliz. 920.*

(e) *Cro. Eliz. 754.*

(f) By the name of *Goslen's case* *Cro. Eliz. 137.*

Abbreviations, that are usual, are allowable in indictments, as well as in other pleadings, and shall be construed to the best advantage for the maintaining of the indictment, as if an indictment be maintainable upon one statute or more, a conclusion *contra formam statut. in hujusmodi casu edit. & provis.* shall be construed singularly or plurally, as makes best for the maintenance of the indictment. (g)

Figures to express numbers are not allowable in indictments, tho sometimes literal numbers be allowable in returns, but in indictments the numbers, whether cardinal or ordinal, must be expressed in *Latin*.

II. An indictment grounded upon an offense made by act of parliament must by express words bring the offense within the substantial description made in the act of parliament, and those circumstances mentiond in the statute to make up the offense shall not be supplied by the general conclusion *contra formam statuti*.

And so it is, if an act of parliament oust clergy in certain cases, as murder *ex malitiâ præcogitatâ*, robbery in or near the highway, stabbing one not having struck first, nor having a weapon drawn, tho the offenses themselves were at common law, yet because at common law within clergy, they shall not be ousted of clergy, tho convicted, unless these circumstances, as *ex malitiâ præcogitatâ*, or *prope altam viam*, &c. be expressed in the indictment.

But where an offense is made felony, or otherwise punishable by act of parliament, tho the indictment must take in the circumstances, which in the body of the act make up the offense, yet if by a proviso [171] in the same statute, or by any subsequent statute some cases or circumstances are exempted out of the act, the indictment need not mention and qualify the offense, so as to exempt it out of the proviso, but the party shall have advantage of the proviso by pleading *not guilty*, and in the same manner shall have advantage of the subsequent statute to excuse him by virtue of the statute of 21 Jac. cap. 4.

If a statute prohibit any act to be done, and by a substantive clause gives a recovery by action of debt, bill, plaint, or information, but mentions not indictment, the party may be indicted upon the prohibitory clause, and thereupon fined, but not to recover the penalty, as upon the statute of 3 Jac. cap. 5. prohibiting recusants to baptize their children by a popish priest. *H. 7 Car. B. R. per Cur'*, but

(g) This is also alterd by 4 Geo. 2. cap. 26. 6 Geo. 2. cap. 6. which prohibits all abbreviations in indictments, &c.

then it seems the fine ought not to exceed the penalty, *P. 22 Car. B. R. College of Physicians, vide tamen M. 20 Jac. B. R. Croke, n. 4. Castle's case contra. (h)*

But if the act be not prohibitory, but only that if any person shall do such a thing, he shall forfeit 5*l.* to be recovered by action of debt, bill, plaint, or information, he cannot be indicted for it, but the proceeding must be by action, bill, plaint, or information. *P. 6 Car. B. R. Day's case.*

If a man be indicted for an offense, which was at common law, and concludes *contra formam statuti*, but in truth it is not brought by the indictment within the statute, it shall be quashed, and the party shall not be put to answer it as an offense at common law.

As if a man be indicted for drawing his dagger in the church upon *J. S. contra formam statuti, viz. 5 E. 6. cap. 4.* but omits these words *with an intent to strike*, the indictment shall be quashed, and the party not put to answer the assault at common law. *P. 33 Eliz. B. R. Croke, n. 23. Penhallo's case. (i)*

So if a man be indicted for a riotous and forceable entry *contra formam statuti, viz. 8 H. 6. cap. 9.* and the statute is misrecited, he shall not be put to answer the offense at common law, but the indictment shall be quashed. *M. 35 & 36 Eliz. B. R. [172] Croke, n. 10. Hall and Gaven (k), M. 41 Eliz. B. R. Croke, n. 10. Eden's case (l) yet vide M. 10. Car. Holme's case. (m)* A man indicted for felonious burning of a house, upon *not guilty* pleaded a special verdict was found, it was adjudged no felony, as the case was found, yet upon the same indictment he was adjudged to the pillory, and fined 500*l.* and bound to his good behaviour, but *quære* of that case, for it seems unreasonable, because being tried for felony, he hath not those advantages for his defense, as if he were indicted only for trespass; *(n) M. 10 Car. B. R. Croke, n. 3. vid. 2 H. 7. 10. b.*

If a statute be particular, it must be recited in the indictment, and proved by an examined copy upon the trial.

But if a man be indicted *quòd furatus est*, and says not *felonicè*, this indictment imports but a trespass, and the offender may be put to answer it as a trespass. *2 H. 7. 10. b. 18 E. 4. 10. b.*

(b) *Cro. Eliz.* 644.

(i) *Cro. Eliz.* 231.

(k) *Cro. Eliz.* 307.

(l) *Cro. Eliz.* 697.

(m) *Cro. Car.* 376.

(n) For instance, he could not have the assistance of counsel.

And so it seems, if a man be indicted at a leet, *quòd felonice rapuit* such a woman, and this indictment is removed into the king's bench; because the leet hath no jurisdiction to take an indictment of rape as a felony, he shall not be put to answer it as a felony, but shall be fined as for a trespass, because as a trespass the leet may enquire of it. 6 H. 7. 5. a.

If it be a general statute, it need not be recited, but it is sufficient to conclude *contra formam statuti in hujusmodi casu edit' & provis'*, for the court ought to take notice of it, and all penal statutes, that induce a forfeiture to the king, or make a felony or treason are general statutes, because it concerns the king; but if a general statute be recited in an indictment, and be misrecited in a point material, and conclude *contra formam statuti prædicti*, it is fatal, and the indictment shall be quashed, but it seems, that if it conclude generally

[173] *contra formam statuti in hujusmodi casu edit' & provis'*, it is good, for the court takes notice of the true statute, and will reject the misrecital as surplusage. M. 7 Car. B. R. Croke, n. 14. Barn's case (o) in maintenance, and M. 8 Car. B. R. per Jones *super stat. de cottages* (p).

1. If an act of parliament making a felony or other offense be but temporary, and made perpetual by another statute, the indictment concluding *contra formam statuti* is good.

2. If the former statute be discontinued, and revived by another statute, the best way is to conclude *contra formam statutorum*, M. 31 & 32 Eliz. B. R. Mill's case, tho there is good opinion, that it is good enough to conclude *contra formam* of the statute, as in case of the statute of 5 E. 6. of ingrossing, 37 H. 8. for usury, and 5 Eliz. for perjury, which were discontinued and revived, yet the indictments good concluding *contra formam* of the first statute. T. 9 Jac. Rot. 124. C. B. Westwood's case.

3. If one statute be relative to another, as where the former makes the offense, the latter adds the penalty, as the statutes of 1 and 23 Eliz. the indictment ought to conclude *contra formam statutorum*. P. 42 Eliz. B. R. Croke, n. 6. Dingly and Moore (q).

III. Touching the joining of persons and offenses in one indictment.

(o) Gro. Car. 232.

(p) 31 Eliz. cap. 7.

(q) Cro. El. 750.

If there be one offender and several capital offenses committed by him, they may be all contained in one indictment, as burglary, and larciny: Larcinies committed of several things, tho at several times, and from several persons, may be joined in one indictment.

If there be several offenders, that commit the same offense, tho in law they are several offenses in relation to the several offenders, 21 E. 4. yet they may be joined in one indictment, as if several commit a robbery, or burglary, or murder.

And so it is, if the offenses are of several degrees, but dependent one upon another, as the principal in the first degree, and the principal in the second degree, *viz. present, aiding, and abetting* the principal, and accessory before or after.

[174] IV. Touching the joining of several offenses of the same nature, but distinctly committed by several offenders, some have been ruled insufficient, as an indictment of several persons, *quòd non escourarunt fossata separalia ante separalia sua pomaria*, quashed in 23 Car. 1. B. R. so of several officers, *quòd colore separalium officior suorum separalitèr extorsivè ceperunt*, &c. M. 33 & 34 Eliz. B. R. *Lake's case* in *Hughe's Rep.* and so if two are indicted for using a trade not being bound apprentice, it is not good. P. 16 Car. 1. B. R. *Brooke's case* (r).

But yet in 21 T. 21 Jac. B. R. *A. B. C. and D.* were indicted for erecting four several inns *ad commune nocumentum*, it was ruled, that for several offenses of the same nature several persons may be indicted in the same indictment, but then it must be laid *separalitèr erexerunt*, and for want of that word (*separalitèr*) the indictment was quashed.

And it is common experience at this day, that twenty persons may be indicted for keeping disorderly houses, or bawdy-houses, and they are daily convict upon such indictments, for the word *separalitèr* makes them several indictments.

(r) 2 R. A. 78. pl. 6.

C H A P. XXV.

Concerning the forms of indictments in particular, and the several parts thereof.

THE most considerable parts of an indictment in capital offenses are, 1. The name and addition of the party offending. 2. The day and time of the offense committed. 3. The place where it was committed. 4. Upon or against whom committed. 5. The manner of the commission of it. 6. The fact itself and the nature of it. 7. The conclusion.

[175] This is the grammatical order, wherein things are set down in the indictment, and upon these parts most of the considerations and observations touching indictments do arise, and those that are not reducible to these heads, are partly observed before, and shall be more fully prosecuted in the end of this chapter.

I. As to the name and addition of the party indicted, this regularly ought to be inserted, and inserted truly in every indictment.

But if the party be indicted by a wrong christian name, surname, or addition, and he plead to that indictment *not guilty*, or answers to that indictment upon his arraignment by that name, he shall not be received after to plead *misnomer*, or falsity of his addition, for he is concluded and estopped by his plea by that name, and of that estoppel the gaoler and sheriff, that doth execution, shall have advantage.

M. 16 Jac. and P. 17 Jac. B. R. Debt was brought against Sir Francis Fortescue knight and baronet, and he appeared, and judgment given against him, ruled 1. That he shall never assign for error, that he was no baronet, tho baronet be parcel of the name. 2. If execution be sued against him by the name of Sir Francis Fortescue knight and baronet, and he brings false imprisonment against the sheriff, the sheriff shall have advantage of this estoppel, adjudged (a).

Therefore he, that will take advantage of the *misnomer* of his christian name, addition, or surname, must do it upon his arraignment, and the entry must be special, *viz. super quo venit Robertus*

(a) 2 *Rol. Rep.* 50, 88.

Williams, *qui indictatus est per nomen Johannis Williams, & dicit quòd ubi in indictamento supponitur, quòd quidam Johannes Williams vi & armis, &c. ipsius nomen est Robertus & non Johannes*; for, if he should say *venit prædictus Johannes Williams*, he concludes himself, and cannot plead, that is name is *Robert*, and so I have known it ruled against the book of 1 E. 4. 2. b.

The misnaming of the surname of the offender in an appeal is a good plea in abatement, but tho the surname be mistaken in an indictment, yet it shall not abate. 1 H. 5. 5. b. *per Hank-* [176]
ford. Stamf. P. C. Lib. III. cap. 18. tamen quære.

But the mistake of the christian name is pleadable, as well in case of an indictment, as an appeal, and the party shall be dismissed from that indictment. 11 H. 4. 41. b. *Coron. 88. Stamf. P. C. ubi supra*, but by *Rolf* 3 H. 6. 26. a. it is no plea in an indictment (b).

But the safest way is to allow his plea of *misnomer* both as to his surname and as to his christian name, for he that pleads *misnomer* of either, must in the same plea set forth what his true name is, and then he concludes himself, and if the grand jury be not discharged, the indictment may presently be amended by the grand jury, and returned according to the name he gives himself.

By the statute of 1 H. 5. cap. 5. in all indictments, &c. the party indicted ought to have the addition of his mystery, degree, place, and county.

Therefore, if the party indicted have no addition, or a false addition, he may upon his arraignment except to the former, and plead to the latter.

And if he be outlawed upon such indictment, where there is no addition, or a false addition, he may avoid it by a writ of error, &c.

But altho there be no addition, yet if he appear, and plead not guilty without taking advantage of that defect, he shall never allege the want of addition to stop his trial or judgment, for by such his appearance and pleading to issue the indictment is affirmed, and the want of addition salved, and the statute satisfied. H. 18 Jac. B. R. *Croke, n. 5. Johnson's case (c)*, adjudged.

The addition required by the statute is of his degree, as *Yeoman, Gent, Esq*; of his mystery, as *husbandman, sailor, spinster, &c.* therefore, if the addition be only general, as *servant, farmer, citizen*, 9 E.

(b) The words of the book are, *it is no plea in felony.*

(c) *Cro. Eliz. 609.*

4. 48. *a.* or of crimes or misdemeanors only, as extortioner, vagabond, heretic, 22 *E.* 4. 1. *a.* these are no good additions.

[177] The addition ought to be to his substantive name, not only to the *alias dictus*. *M.* 33 & 34 *Eliz.* *Croke*, *n.* 11. *Leke's* case (*d*) as *A. B. alias dictus A. C. butcher*, because regularly the addition refers to the last antecedent, and upon the same reason it is, if the indictment run *Sibilla B. nuper de C. uxor Johannis B. nuper de C. spinster*, because *spinster* is an addition applicable to the husband, as well as to the wife; but an indictment of *John B. vir*, *Emelin B. nuper de C. yeoman* is good, because *yeoman* is not applicable to a woman, but to a man. *P.* 31 & 32 *H.* 8. *Dyer* 46, 47. adjudged, and 4 *H.* 6. 4. *b.*

Single woman is a good addition, 14 *E.* 4. 7. *b.* so is *widow*, 10 *H.* 6. 21. *a.* so is *uxor J. S.* adjudged, *P.* 42 *Eliz.* *B. R.* *Eleanor Gower's* case.

An indictment against a peer of the realm is good without an addition, because no process of outlawry lies against him. *M.* 31 & 32 *Eliz.* *B. R.* *Croke*, *n.* 15. Lord *Dacre's* case (*e*).

If several persons be indicted for one offense, *misnomer* or want of addition of one quasheth the indictment only against him, and the rest shall be put to answer, for they are in law as several indictments, and so in trespass. 7 *E.* 4. 10. *b.*

Because the titles of *misnomer* and addition are general titles, whereof much is said in our books, as well in cases of civil suits as indictments, this shall suffice in this place touching this part of the indictment.

II. Touching the time, *viz.* the year and day, wherein the fact was committed; this is necessary to be contained in the indictment.

Tho the day be inserted, but not the year, the indictment is insufficient, and it shall not be supplied by intendment of (*ultimo præterito*,) unless it be so exprest, but if it be so exprest, it is sufficient ascertaining the year by the day of the sessions. *Lamb.* 49.

If the sessions be held the 20 day of *May*, and the indictment suppose the offense to be the 10 day of *Maii ultimi præteriti*, it [178] relates to the month, if *ultimo præterito* it relates to the day by the necessary grammatical construction, but if it be *ult' præterit'* with an abbreviation without the termination of the genitive or ablative case, it shall relate to the day, *viz.* the 10th day of the same *May*, as if it were in *English* the 10th day of *May* last past, it re-

(*d*) *Gro. Eliz.* 249, 198.

(*e*) *Gro. Eliz.* 148.

lates to the day and not to the month regularly, and so for the words next ensuing, *vide P. 23 Eliz. B. R. Rot. 39. b. Sir Richard Shuttleworth's case, M. 21 Jac. B. R. Croke, n. 14. Buckley's case (f).*

If *A.* be indicted, that he *in festo Sancti Petri anno 20 Car.* kild *J. S.* this is not good, because there be two feasts of *St. Peter*, and neither without addition. *3 H. 7. 5. b. viz. St. Peter ad vincula, and St. Peter in cathedrâ.*

If *A.* be indicted, *quòd primo die Maii & secundo die Maii apud D.* he made an assault upon *B.* & *quandam togam ipsius B. adtunc & ibidem invent' felonice cepit, &c.* this indictment is not good, because there are several days mentiond before, and it is uncertain to which the felonious taking shall relate. *2 H. 7. 7. b. & 10 b.*

A. is indicted, *quòd primo die Maii anno 21 Eliz. in quendam B. insultum fecit & ipsum verberavit,* and says not *adtunc & ibidem verberavit,* yet ruled good, for the *vi & armis,* day and place named in the beginning refer to all the ensuing acts. *5 H. 7. 17. b.*

But in an indictment of felony there must be *adtunc & ibidem* to the stroke or to the robbery, and the day and place of the assault is not sufficient*, and this is *in favorem vitæ.* *P. 43 Eliz. B. R. Richardson's case.* And therefore it is usual to repeat the *adtunc & ibidem* to the several parts of the fact, as in larciny or robbery from the person, *quòd A. B. die, &c. anno, &c. apud, &c. in quendam C. D. insultum fecit, & bona & catalla ipsius C. D. scilicet unam togam ad valenc', &c. adtunc & ibidem inventam adtunc & ibidem felonice cepit & asportavit;* *A.* is indicted, *quòd primo die Maii anno 2 Eliz. apud C. habens in manu suâ dextrâ gladium, &c. percussit B.* and it is not said *adtunc & ibidem percussit* quashed, because the day and year, and place relate only to the having of [179] the sword, not to the stroke. *H. 42 Eliz. Croke, n. 11. Cotton's case (g).*

If *A.* be indicted of murder or manslaughter, as well the day and place of the stroke or other act done inducing, death, as of the death, must be exprest, the former, because the escheat or forfeiture of lands relates thereto, the latter, because it must appear, that the death was within the year and day after the stroke.

But tho the day or year be mistaken in the indictment of felony or treason, yet if the offense were committed in the same county, tho

(f) *Cro. Jac. 677.*

* Because it is the stroke or robbery,

which makes the felony.

(g) *Cro. Eliz. 739.*

at another time, the offender ought to be found guilty; but then it may be requisite, if any escheat or forfeiture of land be conceived in the case for the petit jury to find the true time of the offense committed, and therefore it is best in the indictments to set down the times as truly as can be, tho it be not of absolute necessity to the defendant's conviction. 2 Co. Instit. 318. P. 32 Eliz. Syer's case adjudged. Co. P. C. p. 230.

And therefore, if for that variance he be acquitted, he is erroneously acquitted, and yet that erroneous acquittal shall be a good plea of *autrefois acquit*, for if he be afterwards indicted for the same felony, and the day truly set forth, he may aver it to be the same felony notwithstanding the variance in the day. 2 Co. Instit. *ubi supra* in felony, and the same law is in treason. Co. P. C. p. 230.

Where the time of the day is material to ascertain the nature of the offense, it must be express in the indictment, as in an indictment for burglary it ought to say *tali die circa horam decimam in nocte ejusdem diei felonice & burglariter fregit*, yet by some opinion *burglariter* carries a sufficient expression, that it was done in the night.

So upon breaking a house in the day-time, to oust the offender of his clergy upon the statute of 39 Eliz. cap. 15. it is usual to add *tempore diurno*, for the statute expresseth it so, otherwise, tho the indictment be good, yet he shall not be ousted of his clergy.

[180] III. Touching the place where the felony is committed; regularly the vill, or hamlet and county must be express in the indictment.

And herein much of what hath been said of the time will be applicable to the place, for where the time must be repeated again upon several acts done, yet regularly the place also must be repeated, *viz. adtunc & ibidem*.

In some crimes no vill need be named, as upon an indictment of barretry, because he is a barretor every where, and it shall be tried *de corpore comitatûs*. T. 43 Eliz. B. R. Tunstall's case, but P. 3 Car. B. R. Mann's case the indictment was quashed for want of a vill alledged; the latter resolution is fittest to be pursued.

Suff. In the margin, the indictment supposing a fact done *apud S. in com' prædict'* is good, for it refers to the county in the margin.

But if there be two counties named, one in the margin, another in the addition of any party, or in the recital of an act of parliament recited in the premises of the indictment, the fact laid *apud S. in com' prædicto*

prædicto vitiates the indictment, because two counties are named before, and it is uncertain to which it refers. *H. 42 Eliz. B. R. Croke, n, 12. Wingfield's case (h).*

Indictment against *A. B.* that he *apud N. in com' prædict'* made an assault upon *C. D. of F. in com' prædict'*, & ipsum *adtunc* & *ibidem cum quodam gladio, &c. percussit, &c.* this indictment is not good, because two places named before, and if it refers to both, it is impossible, and if only to one, it must refer to the last, and then it is insensible. *2 H. 7. 10. b. P. 44 Eliz. B. R. Ogle's case.*

A. is indicted, *quod ipse tali die & anno apud C. in quendam B. insultum fecit, & ipsum cum quodam cultello, &c. felonice percussit, occidit, & murdravit* without saying *adtunc* & *ibidem percussit, occidit, & murdravit*, the indictment is not good, for the assault may be at one day and place, and the killing at another. *P. 5 E. 6. Dy. 68, 69. 1 R. 3. 1. a.*

If a man be indicted for that *ratione tenuræ* of certain lands he is bound to repair a bridge, and that it is in decay, it must be alleged where those lands lie. *5 H. 7. 3. b.* [181]

IV. Touching the name of the person upon whom the offense is committed.

An indictment of murder *cujusdam ignoti* is good, and so for stealing of the goods *cujusdam ignoti*, *Plo. Com. 85. b. Partridge's case, 1 Mar. Dy. 99. a.* so of an assault *in quendam ignotum*, and if he be acquitted or convicted, and be afterwards indicted for an assault or murder of such a man by name, he may plead the former conviction or acquittal, and aver it to be the same person. *11 Eliz. Dy. 285. a.*

But an indictment, *quod invenit quendam hominem mortuum, ac felonice furatus est duas tunicas*, without saying *de bonis & catallis cujusdam ignoti*, is not good. *11 R. 2. Enditement 27.*

If the goods of a chapel be stolen, the indictment shall say *bona & catalla capellæ in custodiâ præpositorum*, if it be done in time of vacation *bona & catalla capellæ tempore vacationis*; but if the goods of a parish church be stolen, as the bell, the books, &c. it shall run *bona parochianorum de S. in custodiâ gardianorem ecclesiæ*, and shall not suppose them *bona ecclesiæ*. *7. E. 4. 14, 15. M. 31 & 32 Eliz. B. R. Hadnam & Green versus Ringwood (i). T. 36 Eliz. B. R. Methold & Barefoot.*

(b) *Cro. Eliz. 739.*

(i) *Cro. Eliz. 145, 179.*

If the goods, which *A.* hath as executor of *B.* be stolen, the offender may be indicted, *quòd bona B. testatoris in custodia A. executoris ejusdem B. &c.* *Lamb.* 496. or it may be general *bona ipsius A.*

If *A.* dying, be buried, and *B.* opens the grave in the night time and steals the winding-sheet, the indictment cannot suppose them the goods of the dead man, but of the executors, administrators, or ordinary, as the case falls out. *Co. P. C.* 110 (*k*).

If *A.* delivers goods to *B.* a common carrier to carry for him, and *B.* is robbed, the indictment may suppose them the goods of *A.* or the goods of *B.* at election, for *B.* hath a kind of special property, because chargeable for them to *A.*

[182] An indictment, *quòd felonice, &c. cepit quandam peciam panni cujusdam J. S.* without saying *de bonis & catallis cujusdam J. S.* was therefore quashed. *M.* 38 & 39 *Eliz. B. R. Croke, n.* 6. *Long's case* (*l*).

There is no need of an addition of the person robbed or murdered, &c. unless there be a plurality of persons of the same name, neither then is it essential to the indictment, tho sometimes it may be convenient for distinction sake to add it, for it is sufficient, if the indictment be true, *viz.* that *J. S.* was killed or robbed, tho there are many of the same name.

V. Touching the thing wherein or of which the offense is committed, there is required a certainty in an indictment.

An indictment against *A.* that he is *communis latro*, 29 *Aff.* 45. *communis champartor*, *conspirator*, *confæderator*, 29 *Aff.* 45. *defamator bonorum nominis & famæ*, *M.* 14 *Jac. B. R. Jones's case* (*m*), *communis malefactor*, 22 *Aff.* 73. *common robber*, 3 *E.* 2. *action sur statute* 26. *communis malegestus*, & *communis perturbator pacis domini regis*, *M.* 6 *Car. 1. B. R. Periam's case* (*n*), are not good, because they are too general and contain not the particular matter, wherein the offense was committed.

But *communis barreclator & pacis domini regis perturbator & litium seminator* is good, because barretry is an offense known in law, and consists of divers particulars, and the rest that is added thereunto are but the aggravations of the offense, for barretry itself is the crime, *M.*

(*k*) *Haine's case*, 12 *Co.* 112.

(*l*) *Gro. Eliz.* 490.

(*m*) 2 *R. A.* 79. *pl.* 1.

(*n*) *Ibid.* 79. *pl.* 10.

15 *Jac. B. R. Bowser's case* (o); so an indictment, that he is *noctivagus* is good. *H. 2 Car. 1. B. R.*

An indictment against *A. quod felonice cepit & asportavit bona & catalla B.* without shewing what in certain, as *scilicet unum equum, unum bovem, &c.* is not good. *Lamb. 496.*

The number of things stolen must be exprest, therefore it is not sufficient to say *felonice furatus est aves* or *columbas* out of a dove-cote, or young hawks out of the nest without expressing their number.

If theft be alledged of any thing, the indictment must set down the value, that it may appear, whether it be grand or petit larceny. *Lamb. 497.* [183]

Where theft is charged in an indictment for a living thing, as a horse or sheep, the regular way is to say *pretii 5s. &c.* if it be of a dead thing, that is estimated in the indictment by weight or measure, there also it ought to be *pretii*, and so it may be, if it be of any single thing, tho dead, and not estimated by weight or measure.

But if it be dead things in the plural number, there it ought to be *ad valenciam*. *Lamb. 497.* but this I take to be but clerkship and not substantial, for if *pretii* be set instead of *ad valenciam*, or *e converso*, I think it doth not vitiate the indictment, and so it is, if one *pretii* or *ad valenciam* be added to several things, where in true clerkship it should be applied severally, it is good if the party be convict of all, but possibly, if the party be convict but of part, it is not good, because it will be uncertain whether grand or petit larceny. *Noy's Rep. 115. Wood and Smith, yet vide T. 23 Car. 1. & M. 23 Car. 1. B. R. Brook's case, and William Arundell's case* in [action of] trespass, where there is but one *ad valenciam*, where divers goods were taken, tho it be aided after a verdict, yet, if the judgment be by *nihil dicit*, it was ruled error, and indictments are not aided by verdict.

An indictment, *quod felonice cepit 20 oves matrices & agnos* or *matrices & verveces*, is not good, because it doth not appear how many of one sort and how many of another, but 20 *oves* generally might have been good without distinguishing *matrices & verveces*, as in case of replevin or trespass.

But an indictment *de quatuor riscis & cistis, Anglicè* chests and cofers, is good, because *synonyma*, *P. 40 Eliz. Drecot & Henshaw*; regularly the same certainty is required in an indictment for goods, as in trespass for goods, and rather more certainty, for what will be a defect

(o) *Ibid. 79. pl. 3,*

of certainty in a count will be much more defective in an indictment, therefore for this matter *vide* title *Count & Breve per totum*.

VI. The fact itself must be certainly set down in an indictment.

[184] An indictment against *A. quod felonice abduxit unum equum* without saying *cepit & abduxit* is not good, for he might have the horse by bailment, and then it is no felony. 13 E. 4. 10. a.

An indictment of poisoning, wherein it is alledged, that *J. S. fidem adhibens* to the prisoner, *& nesciens potum prædictum cum veneno fore intoxicatum accepit & bibit*, and says not *venenum prædictum*, is not good, and shall not be supplied by the implication of other parts of the indictment. 4 Co. Rep. 44. b. *Vaux's case*.

An indictment of rape, *quod felonice & carnaliter cognovit* without the word *rapuit* is not good, tho it concludes *contra formam statuti*. 9 E. 4. 26. a.

An indictment, that *A. exoneravit quoddam tormentum, &c. versus B. dans ei unam mortalem plagam* without saying *percussit*, is not good. 5 Co. Rep. *Long's case* 122. a.

So if it be *dedit mortalem plagam* without *percussit*, it is not good. P. 9 Jac. B. R. *Bulstrode's Rep.* p. 124.

For burglary, the offense must be *fregit & intravit*.

VII. The offense itself must be alledged, and the manner of it (*p*).

An indictment of felony must always allege the fact to be done *felonice*; an indictment of burglary must lay the offense to be *felonice & burglariter fregit & intravit*; an offense of high treason must be laid to be done *proditorie*; petit treason *felonice & proditorie*, for tho he be acquitted of the petit treason, he may be convict of the manslaughter or murder.

A. is indicted, that *furatus est unum equum*, it is but a trespass for want of the word *felonice*. *Stamf. P. C.* p. 96. a.

If *A.* be indicted, *quod 1 Decemb. anno, &c. apud, &c. felonice & ex malitiâ suâ præcogitatâ in & super B. insultum fecit, & cum quodam gladio, &c. adtunc & ibidem percussit, & dedit eidem B. mortalem plagam, &c.* whereof he died, the first *felonice & ex malitiâ suâ præcogi-*

[185] *tatâ* applied to the assault runs also to the stroke; 1. because placed in the beginning of the sentence; 2. because done *adtunc & ibidem*.

(p) This should have been the 5th head according to our author's division at the beginning of this chapter, but our author has here transposed it, and added a new

fifth head touching the thing wherein the offense is committed, which makes the number of general heads in this chapter eight instead of seven.

An indictment of murder or manslaughter hath these certainties and requisites to be added to it more than other indictments, for it must not be only *felonice*, and ascertain the time of the act done, but must also,

1. Declare how, and with what it was done, namely *cum quodam gladio, &c.*

Yet if the party were killed with another weapon, it maintains the indictment; but if it were with another kind of death, as *poisoning*, or *strangling*, it doth not maintain the indictment upon evidence. 2 *Co. Inst.* 319. *Co. P. C.* p. 48.

And if *A.* and *B.* are indicted for murder, and it is laid, that *A.* gave the stroke, and *B.* was present, aiding and abetting, yet if it falls out upon evidence, that *B.* gave the stroke, and *A.* was present, aiding and abetting, it maintains the indictment. 9 *Co. Rep.* *Sanchar's* case (q).

So if *A.* be indicted for poisoning of *B.* it must allege the kind of poison, but if he poisoned *B.* with another kind of poisoning, yet it maintains the indictment, for the kind of death is the same.

2. He must shew in what hand he held his sword.

If an indictment runs thus, that *cum quodam gladio, quem in dextrâ suâ tenuit, percussit*, without saying *in dextrâ manu*, for this cause an indictment was quashed. *P.* 44 *Eliz. B. R.* *Cuppledick's* case.

3. Regularly it ought to set down the price of the sword or other weapon, or else say *nullius valoris*, for the weapon is a deodand forfeited to the king, and the township shall be charged for the value if delivered to them.

But this seems not to be essential to the indictment.

4. It ought to shew in what part of the body he was wounded, and therefore if it be *super brachium*, or *manam*, or *latus* without saying whether right or left, it is not good. 5 *Co. Rep.* 121. b. *Long's* case.

So if it be *in sinistro bracio*, where it should be *brachio*, it is not good, because insensible. *T.* 31 *Eliz. B. R.* *Webster's* [186] case.

So if the wound be laid *circiter pectus*, it is not good. *T.* 29 *Eliz. Clenche's Rep.* 10. *Super partes posteriores corporis* not good. *H.* 23 *Car.* 1. *B. R.* *Savage's* case (r).

But *super faciem*, or *caput*, or *super dextram partem corporis*, or *in infimâ parte ventris* are certain enough. *Long's* case, 5 *Co. Rep.* 121. b.

(q) 9 *Co.* 119. a. all that this case proves is only, that if a man be indicted as accessory to two, and he be found guilty as ac-

cessary to one, the verdict is good.

(r) *Styl.* 76.

5. Regularly the length and depth of the wound is to be shewed, but this is not necessary in all cases, as namely where a limb is cut off, 4 Co. Rep. 42. a. Haydon's case; so it may be also a dry blow, and *plaga* is applicable to a bruise or a wound.

But tho the manner and place of the hurt and its nature be requisite, as to the formality of the indictment, and it is fit to be done, as near the truth as may be, yet if upon evidence it appear to be another kind of wound in another place, if the party died of it is sufficient to maintain the indictment.

6. It is usual to alledge the party stricken to have been *in pace Dei & domini regis*, but not necessary to be inserted. 4 Co. Rep. 41. b. Haydon's case.

7. It is necessary to alledge in fact, that the party wounded died of that wound, and also the time and place, as well of the death as of the wound given, that it may appear, that he died within the year and day of that wound, as *de quâ quidem plagâ idem J. S. adtunc & ibidem instantèr obiit*, or *de quâ quidem plagâ mortali idem J. S. languebat, & languidus vixit usque talem diem anno supradictò, quo quidem die idem J. S. de plagâ mortali prædictâ obiit*.

Altho as well in the indictment of manslaughter as murder the stroke is to be alleged to be *mortalis plaga*, and given *felonice*, and in both cases *interfecit*, yet in case of murder there is somewhat more to be laid, or otherwise it will amount but to an indictment of manslaughter, and the offender shall have his clergy.

[187] And the special words in an indictment of murder are, 1. *Ex malitiâ præcogitatâ*. 2. *Murdravit*, this word *murdravit* is a word of art, and cannot be otherwise exprest, therefore *murderavit* instead of *murdravit* vitiates an indictment of murder. H. 45 Eliz. Croke, n. 15. Ryle's case (s).

Tho *murdravit* be in the indictment, yet if it want the words *ex malitiâ suâ præcogitatâ*, the party shall have his clergy. Dy. 224. b. 11 Co. Rep. 37. a.

An indictment of treason for counterfeiting the king's coin ought to shew particularly what kind of coin, viz. groats, or shillings. 27 H. 6. Enditement 10. but altho it is usual to express the numbers of each kind, yet it is not of absolute necessity in the indictment. M. 38 & 39 Eliz. B. R. Long's case.

An indictment of high treason for conspiring the king's death ought not only to contain the compassing or conspiring to do the act, but must also set down an overt act in pursuance of it.

As in all indictments of felony there must be *felonice*, and of treason there must be *proditorie*, so it must be laid to be done *vi & armis* at common law. *Stamf. P. C.* 94. a.

But the statute of 37 *H. 8. cap. 8.* hath now made that not to be necessary.

And therefore *P. 16 Jac. B. R. Croke, n. 2. Hart's case (t)*, it was adjudged and affirmed in a writ of error, that an indictment of rescue without the words *vi & armis* is good by reason of this statute, which extends to make good indictments of felony, treason, or other misdemeanors, notwithstanding the omission of *vi & armis*, as well as notwithstanding the omission of *gladiis, baculis & cultellis*, but this statute extends not to declarations in trespasses, suits between party and party, or informations for the king, but only to indictments.

VIII. Touching the conclusion of the indictment.

Upon an indictment of murder, where the stroke is supposed to be done at one day or place, and the death at another day or place, the conclusion ought not to be *& sic felonice, voluntarie, & ex malitiâ suâ præcogitatâ prædictus J. S. præfatum A. B. at the day and place, where the stroke was given, interfecit & murdravit*, this is not good, because tho the stroke is the offense and cause of the death, yet it is neither murder nor manslaughter till the party die. *M. 32 & 33 Eliz. B. R. Croke, n. 13, Foster's case (u)*. [188]

But if it supposes the murder or manslaughter to be where the party died, this is good, for then and not before it is murder. *4 Co. Rep. 41. b. Haydon's case.*

But the best way is *& sic præfatus A. ipsum B. &c. modo & formâ prædictis interfecit & murdravit. 4 Co. Rep. 42. b. Haydon's case.*

But if the conclusion be *& sic præfatum B. apud C. (where the stroke only was given) modo & formâ prædict' interfecit & murdravit*, it is not good, for it is repugnant. *M. 32 & 33 Eliz. B. R. Croke, n. 13, Foster and Hume.*

And if in the same case the conclusion be only *& sic die & loco prædictis interfecit & murdravit*, it is doubtful whether it be good, because one time and place is alleged for the stroke, another for the

(t) *Cro. Jac.* 473. vide *Cro. Jac.* 345.

(u) *Cro. El.* 156. *4 Co.* 42. b. by the

name of *Hume* and *Ogle*.

death, and (*predictis*) may refer to either, *H. 42 Eliz. B. R. Croke, n. 12. Wingfield's case (x).*

Regularly every indictment ought to conclude *contra pacem domini regis*, for that is not taken away by the statute of 37 *H. 8. cap. 8.*

And therefore an indictment without concluding *contra pacem*, &c. is insufficient, tho it be but for using a trade not being an apprentice. *H. 23 Car. 1. B. R.* for every offense against a statute is *contra pacem*, and ought so to be laid.

But an indictment need not conclude, & *contra coronam & dignitatem ejus*, tho it be usual in many indictments. *M. 23 Car. B. R.*

An indictment that concludes *contra pacem*, and saith not *domini regis*, is insufficient. *M. 23 Car. 1. adjudged.*

If *A.* be indicted for an offense supposed to be committed in the time of a former king, and concludes *contra pacem domini regis nunc*,

[189] it is insufficient, for it must be supposed to be done *contra pacem* of that king, in whose time it was committed.

But if a man be indicted in the time of one king *contra pacem domini regis nunc*, he may be arraigned for that offense in the time of his successor. 1 *E. 6. B. Corone* 178. *Enditement* 44. neither is the indictment itself discontinued by the demise of the king, tho in some cases the process be. 7 *Cq. Rep.* 30, 31.

If an offense be supposed to be begun in the time of one king, and continued in the time of his successor, (as a nuisance,) it must conclude *contra pacem* of both kings, or else it is insufficient. *T. 3 Jac. B. R. Yelverton's Rep.* 66. Sir John Winter's case.

If an offense be alledged in the time of *Q. Eliz.* and the indictment taken in the time of *K. James*, and concludes *contra pacem nuper reginæ & domini regis nunc*, it seems good, and *domini regis nunc* but surplusage, as well as in a count in trespass, *M. 13 Jac. Croke, n. 3. Cottington and Wilkins, (z) quære.*

Touching the conclusion *contra formam statuti*, somewhat hath been said in the last chapter; I shall add some things more.

If an offense be newly enacted, or made an offense of an higher nature by act of parliament, the indictment must conclude *contra formam statuti*, as an indictment for buggery, transporting of wool, &c.

Rape, tho before the statute of *Westminster 2.* it was a trespass, yet being made felony by that statute, the indictment ought to conclude *contra formam statuti*, 6 *H. 7. 5. a.*

(x) *Cro. Eliz.* 739.

(z) *Cro. Jac.* 377.

If an offense were high treason, &c. at the common law, and a declarative act of parliament declares it so, as the statute of 25 E. 3. *de Proditinibus*, the statute of 3 H. 5. of clipping the coin, &c. till repealed by 1 Mar. the indictment is good with a conclusion *contra formam statuti*, or without such a conclusion.

But at this day the indictment for clipping, washing, &c. of coin enacted to be treason by the statutes of 5 & 18 Eliz. must not only express, as the statute requires, that it was (*causa lucri*,) [190] but must conclude *contra formam statuti*.

If an offense were felony at common law, but a special act of parliament oust the offender of some benefit, (that the common law allowed him,) when certain circumstances are in the fact, tho the body of such indictment must express those circumstances according as they are prescribed in the statute, yet the indictment must not conclude, *contra formam statuti*.

Thus the statute of 21 Jac. cap. 27 concerning murdering of bastard children requires proof by one witness, that the child was dead born, the indictment must shew, that it was a bastard child, to bring the offender within that statute, but concludes not *contra formam statuti*.

So by the statute of 8 Eliz. cap. 4. in cases of pick-pockets, 39 Eliz. cap. 15. breaking houses in the day-time, and stealing to the value of 5s. the statute of 23 H. 8. cap. 1. in cases of petit treason, wilful murder of malice prepense, robbing in or near the highway, 18 Eliz. cap. 7. in case of burglary, the statute of 4 & 5 P. & M. cap. 4. in case of malicious commanding, &c. any person to commit murder, robbery, wilful burning, the offenders are ousted of their clergy; the body of the indictment must bring them within the express purview of the statutes or otherwise they shall have the benefit of clergy, but it need not conclude *contra formam statuti*, neither is it usual in such cases, for they were felonies before, and the statutes do not give them a new punishment, nor make them to be crimes of another nature, but only in certain cases take away clergy.

But yet, if they should conclude in these cases *contra formam statuti*, it would not vitiate the indictment, but would be only surplusage; for tho the statutes do not give a new penalty, yet they take away an old privilege, when the case falls within the circumstances mentioned by the act.

Upon the statute of 1 Jac. cap. 8. ousting persons of clergy in case of stabbing, the other party not having a weapon drawn, nor stricken
first

first, I have known it held it is sufficient, that the indictment bring the fact within the purview of the statute, tho it concludes not *contra formam statuti*, because it was felony before, and the statute only takes away clergy. *H. 23 Car. 1. Page and Harwood (a).*

Yet the usual course at this day is to conclude such an indictment *contra formam statuti*, and accordingly it hath been ruled good. *T. 9 Jac. B. R. Croke, n. 4. Bradley and Banks*, but it is not there questioned but that it may be good without it; so that in these cases, where clergy is specially ousted by an act of parliament, the indictment is good with this conclusion or without it, but the best way in these cases is to follow what is most usual.

If an offense be at common law, and also prohibited by statutes, the indictment may conclude *contra formam statuti* or *statutorum*; thus in barretry, tho there be no direct statute against it by that name, yet the general tenor of the several acts running against it by circumlocutions, the indictment concluding *contra formam statuti*, or *diversorum statutorum* is good, and it is the usual form. *M. 31 & 32 Eliz. B. R. Croke, n. 14. Burton's case (b), H. 9 Car. 1. B. R. Chapman's case (c),* but it must conclude also *contra pacem*, *M. 6 Car. B. R. Periam's case (d).*

If an offense be at common law, and also prohibited by statute, with a corporal or other penalty, yet it seems the party may be indicted at common law, and then, tho it conclude not *contra statuti*, it stands as an indictment at common law, and can receive only the penalty, that the common law inflicts in that case.

Thus an indictment for a riot is good, tho it concludes not *contra formam statuti*, because an offense at common law, tho prohibited also by acts of parliament under severer penalties. *P. 5 Jac. B. R. Wormall's case (e).*

So it seems, if perjury be committed, that is within the statute of 5 *Eliz. cap. 9.* but concludes not *contra formam statuti*, yet it
[192] is a good indictment at common law, but not to bring him within the corporal punishment of the statute.

And yet *Mich. 10 Jac. B. R.* an indictment of forceable entry upon the statute of 8 *H. 6. cap. 9.* and *Mich. 9 Car. 1. B. R.* an indictment for forgery quashed for not concluding *contra formam sta-*

(a) *Aleyn 43. Styl 85.*

(b) *Cro. Eliz. 148.*

(c) *Cro. Car. 340.*

(d) 2 *R. A. 82. pl. 5.*

(e) 2 *R. A. p. 82. pl. 4.*

statuti, *Smith's case* (f); yet both these were offenses at common law tho restitution were not at common law in the first case nor pillory and loss of ears in the second, but only fine and imprisonment, or at most standing in the pillory, but without mutilation.

Regularly, if a statute only make an offense, or alter an offense from one crime to another, as making a bare misdemeanor to become a felony, the indictment for such new made offense, or new made felony must conclude *contra formam statuti*, or otherwise it is insufficient.

And on the other side, if an offense be purely at common law, if it conclude *contra formam statuti*, it is insufficient, and shall be quashed, except in the instance above given touching clergy, *de quo supra*.

And therefore an indictment of battery concluding *contra formam statuti* is insufficient, and shall be quashed. *T. 12 Car. B. R. Croke, n. 2. Cholmley's case* (g).

These general observations I shall add touching indictments upon statutes, and concluding *contra formam statuti*.

Altho an indictment grounded upon a statute must conclude *contra formam statuti*, yet it is not necessary to recite the statute in the indictment, unless it be a private statute, whereof the court cannot take notice. *Plo. Com. 79. b. Patridge's case. Dy. 347. a. 363. a.*

Altho it need not recite a general penal statute, yet it must bring the fact within the express prohibition of the statute, otherwise the conclusion *contra formam statuti*, and the implication thereof will not aid the indictment, but it will be insufficient, *9 E. 4. 26. b.* As in an indictment in a *premunire* for aiding one being a principal maintainer of the jurisdiction of the see of Rome *contra formam statuti*, yet these words being omitted *to the intent to set forth the authority, &c.* which are part of the qualification of the offense contained in the statute, the indictment is insufficient, and not aided [193] by the conclusion *contra formam statuti*. *T. 20 Eliz. Dy. 363. a. ibid. 347. a.* so an indictment upon the statute of 1 Jac. cap. 12. of witchcraft, if *A.* be indicted, that *exercuit incantationem, Anglicè* witchcraft, *contra formam statuti*, without saying, that thereby any person was pined, lamed, &c. in his body, it is insufficient, because that is a circumstance required to make it felony; but if the indictment be, that *exercuit, anglicè* did employ *malos & nefarios spiritus eâ*

(f) 2 R. A. 82. pl. 3.

(g) Cro. Car. 465.

intentione to destroy *J. S.* this is good, tho no other event ensues, for the bare employment of evil spirits to or for any intent in felony. *T. 24 Car. 1. B. R.* upon an indictment removed from *St. Edmunds-Bury*.

And thus far touching the forms of indictments, wherein generally we are to take notice, 1. That none of the statutes of jeofails extend to indictments, and therefore a defective indictment is not aided by verdict.

2. That in favour of life great strictnesses have been in all times required in points of indictments, and the truth is, that it is grown to be a blemish and inconvenience in the law, and the administration thereof; more offenders escape by the over easy ear given to exceptions in indictments, than by their own innocence, and many times gross murders, burglaries, robberies, and other heinous and crying offenses, escape by these unseemly niceties to the reproach of the law, to the shame of the government, and to the encouragement of villany, and to the dishonour of God. And it were very fit, that by some law this over-grown curiosity and nicety were reformed, which is now become the disease of the law, and will I fear in time grow mortal without some timely remedy (*h*).

(*h*) This advice of our author would, if complied with, be of excellent use, for it would not only prevent the guilty from escaping, but would likewise be a guard to innocence, for thereby would be removed the only pretence, upon which counsel is denied the prisoner in cases of

felony; for if no exceptions were to be allowed, but what went to the merits, there would then be no reason to deny that assistance in cases, where life is concerned, which yet is allowed in every petit trespass.

[194]

C H A P. XXVI.

Concerning process upon indictments.

IN many cases upon an indictment process of outlawry lies not at common law, nor at this day, as in an indictment of forestalling, *22 E. 4. 11. b.* but in an indictment of trespass the process is *venire facias*, and when *non inventus*, is returned *capias* and *exigent*.

But in all indictments of felony or treason process by *capias* and *exigent* lies, and at the common law in case of felony or treason there
was

was but one *capias*, and upon *non inventus* returned an *exigent* awarded, and so to the outlawry. 22 *Aff.* 31. 1 *H.* 5. 6. *a.*

But by the statute of 25 *E.* 3. *cap.* 14. If a man be indicted before justices in their sessions to hear and determine, and be returned *non est inventus* upon the *capias* issued, another writ of *capias* shall issue returnable three weeks after with a precept to seize his goods, and detain them till the precept returned, and if again *non inventus* be returned, then an *exigent* shall issue, and the goods forfeit, and if he yield himself upon the *capias*, then the goods saved.

This statute extends not to treason, and therefore certainly in treason the *exigent* must issue upon *non inventus* returned upon the first *capias*.

And altho the statute speaks generally of felony, it seems that upon an indictment of murder the *exigent* shall issue after the first *capias*, as at common law, and accordingly in an appeal of robbery. 8 *H.* 5. 6. *b.* *Process* 226. *Coron.* 184.

But it is said, that in an indictment (or appeal) of robbery there shall be two *capias* in the king's bench before the *exigent* shall issue. 8 *H.* 5. *ubi supra.* *Stamf. P. C. Lib.* II. *cap.* 17. *fol.* 67. *a.*

But at this day the process in case of an indictment of any felony is only one *capias*, and then an *exigent*. [195]

For this statute of 25 *E.* 3. *cap.* 14. as to the second case is hardly applicable to the king's bench, nor indeed well to other justices, that sit by commission, for the second *capias* is to be returned at three weeks after, which may be out of term, or after the session of the justices ended; therefore *quære* the usage.

By the statute of 8 *H.* 6. *cap.* 10. upon appeals or indictments of treason, felony, or trespass before justices of peace or any other having power to take such indictments or appeals, or other justices or commissioners in any county or franchise against any person dwelling in any other county than where the indictment or appeal is taken, after the first *capias*, another *capias* shall issue to the sheriff of that county, wherein the party indicted is supposed to be conversant, returnable before the said justices or commissioners three months after, &c. with a precept to the sheriff to make proclamation at two county courts for his appearance at the day of the return, and then the *exigent* to issue upon his default, and in case any *exigent* be awarded, or outlawry pronounced, otherwise to be holden for none.

But if the party were conversant in the county where he is indicted at the time of the felony or treason committed, the process to be, as was at common law.

A proviso not to extend to the king's bench nor *Chester*.

By the statute of 10 *H. 6. cap. 6.* the same process is directed upon indictments of felony or treason removed into the king's bench by *certiorari*, or into any other courts.

But as to indictments of felony or treason originally taken in the king's bench, they are not within these statutes, but by the statute of 6 *H. 6. cap. 1.* there is special provision made, that before any *exigent* awarded the court shall issue a *capias* to the sheriff of the county, where the indictment is taken, and another to the sheriff of that county whereof he is named in the indictment, having six weeks time or more before the return, and after these writs returned the *exigent* to issue as before.

[196] Upon these statutes, little effect hath been obtained, for if the party were conversant in the county where the felony or treason was committed, (as indeed he cannot be otherwise,) then he may be named of that place where the fact was committed in the indictment, and then the process is to go, as at common law before the statutes, and this is the usual course at this day, that if the felony be committed in *A.* in the county of *B.* the indictment runs only, *quod J. S. nuper de A. in com' B. prædict'* (where the indictment is taken).

And upon the same reason it is, if *J. S.* be indicted in the county of *B.* for a felony there committed, and the indictment runs thus: *J. S. nuper de A. in com' B. aliàs J. S. nuper de D. in com' S.* there shall no process go to the sheriff of *S.* because that addition is only in the *aliàs dictus*, which is neither material nor traversable, and therefore process shall issue only in the county of *B.* where he is indicted, and no *capias* with proclamation in the county of *S.* and the same law in an appeal. 1 *E. 4. 1. a.*

If *J. S.* be indicted in the county of *B.* in this manner; *J. S. de A. in com' B. nuper de C. in com' D.* the *capias* shall issue only in the county of *B.* for there the indictment supposeth him actually conversant at the taking of the indictment; but if the indictment runs thus: *J. S. nuper de A. in com' B. nuper de C. in com' D.* in this case there shall go a *capias* not only into the county of *B.* where he is indicted, but upon the return thereof, (if it be before commissioners,) a ca-

a *capias* with proclamations to the sheriff of *D.* and (if in the king's bench upon an indictment originally found there,) one *capias* to one sheriff, and another to the other sheriff according to the statutes of 8, 10 and 6 *Hen. 6.* above-named, because he is not named *de A. in com' B.* but *nuper de A. in com' B.* and *nuper de C. in com' D.* and not with an *aliàs dictus*, as in the former case. 30 *H. 6. Process* 192 (*h*).

If a man be indicted by the name of *J. S. nuper de A. in com' Cestrie*, the second *capias* with proclamation shall be awarded to the prince or his lieutenant, 31 *H. 6. 11.* and the like to the bishop of *Durham*, or chancellor of *Lancaster*. [197]

There was a very sharp, yet useful statute, 2 *H. 5. cap. 9.* “ If
 “ any person make complaint in the chancery of any felony or riot
 “ committed, and that the offender fly or withdraw himself to the
 “ intent to avoid execution of the common law, a bill thereof shall
 “ be made for the king and delivered to the chancellor, who, (if he
 “ be duly informed, that such bill containeth truth,) shall, at his dis-
 “ cretion, grant a *capias* to the sheriff of the county where the of-
 “ fense is committed, returnable in chancery at a certain day; and
 “ if the persons yield themselves to the sheriff, they shall be com-
 “ mitted or bailed, as the case shall require, and it shall be commanded
 “ to inquire of the fact, and thereupon to be done as the law re-
 “ quireth; but if they appear not, then a writ of proclamation to
 “ issue to the sheriff returnable in the king's bench, by which it shall
 “ be commanded, that he make proclamation in two counties, that
 “ the parties appear in the king's bench to answer the matters in the
 “ bill, (the substance whereof is to be recited in the writ,) upon
 “ pain to be convicted of the offense, and if they come not at the day,
 “ to stand attaint, and if they come *then*, the fact to be inquired of
 “ as above.

“ Provided that the suggestion of such riots be testified to the chan-
 “ cellor under the seals of two justices of the peace and the sheriff
 “ of the county before the *capias* granted, the substance of the com-
 “ plaint to be express in the writ of *capias*, and also in the writ of
 “ proclamation.” Like provision for the counties palatine.

This is marked as an obsolete statute, but I know no act of par-
 liament that repeals it, unless it be the implication of the statute of

(b) And *Process* 103.

16 *Car. 1. cap. 10.* which yet seems not to extend to the repeal of these statutes, for the chancellor hath no power to hear and determine the offenses, but only to grant preparatory process to bring them *in* to answer according to law, for they are to be proceeded against by indictment, if they appear.

[198] Yet this statute hath not been, that I know of, put in ure.
 1. Because it seems doubtful, whether it extends to murders or robberies, unless accompanied with a riot. 2. Because it is left to the discretion of the chancellor to issue the process. 3. Because so many things previous to the process are required, as bill, certificates, probable evidence. 4. Because it takes up so much delay, that they may as soon be taken up by the ordinary way of indictment and process of outlawry. 5. And especially, because in such case the warrant of the chief justice or any other judge of the king's bench, upon oath made touching the offense and the offenders, reacheth all parts of *England*. 6. Because it is so severe, for an innocent person may be convicted upon default of appearance, and yet have had no notice; but in case of an outlawry, tho it be an attainder in itself, yet small exceptions are commonly allowed to the process or return, and so by writ of error usually and easily reversible, and the party put to plead to the indictment.

But certainly it might be of great use to bring *in* and punish notorious offenders, if issued discreetly and upon great occasions, provided the parties were first indicted by the grand inquest.

Now, for the farther declaring the business of process upon indictments of felony these points are considerable. 1. Who may issue process of outlawry. 2. Against whom it is to be issued in relation to principals and accessaries. 3. What the tenor of the *exigent* and outlawry. 4. What the effect or consequence of either. 5. How avoided either by discontinuance, *superseas*, or error.

I. As to the first of these, namely, who may issue process by *capias* and *exigent*.

The court of king's bench either upon an indictment originally taken before them, or removed thither by *certiorari* may issue process of *capias* and *exigent* into any county of *England* upon a *non est inventus* returned by the sheriff of the county, where he is indicted, and a *testatum*, that he is in some other county.

[199] Justices of gaol-delivery regularly cannot issue a *capias* or *exigent*, because their commission is to deliver the gaol *de prisonibus*

prisonibus in ea existentibus, so that those, whom they have to do with, are always intended in custody already; *vide supra cap. 5.*

Justices of *oyer and terminer* may issue a *capias* or *exigent*, and so proceed to the outlawry of any person indicted before them, directed to the sheriff of the same county, where they hold their sessions at common law.

But by the statute of 5 *E. 3. cap. 11.* they may issue process of *capias* and *exigent* to all the counties of *England* against persons indicted or outlawed of felony before them.

Justices of peace may make out process of outlawry upon indictments taken before themselves, or upon indictments taken before the sheriff, and returned to the justices of peace by the statute of 1 *E. 4. cap. 1.* but the power of the sheriff to make any process upon indictments taken before him is taken away by that statute.

The process to the outlawry, *viz.* the *capias* and *exigent* must be in the king's name, and under the judicial seal of the king appointed to that court that issues the process, and with the *teste* of the chief justice, or chief judge of that court or sessions.

A man is indicted by inquisition before the coroner, *quære* if he can by law make out process of outlawry; *videtur quòd sic.* 27 *Affiz.* 47. *B. outlawry* 38.

II. Against whom process of outlawry shall issue upon an indictment.

Altho in civil actions between party and party regularly a *capias* or *exigent* lies not against a lord of parliament of *England*, whether secular or ecclesiastical, yet in case of an indictment for treason or felony, yea, or but for a trespass *vi & armis*, as an assault or riot, process of outlawry shall issue against a peer of the realm, for the suit is for the king, and the offense is a contempt against him: And therefore, if a rescue be returned against a peer, 1 *H. 5.* or if a peer of parliament be convicted of a disseisin with force, *H. 32 Eliz. B. R. Croke, n. 9.* Lord *Stafford's* case (*i*), or denies his deed, [200] and it be found against him, *M. 38 & 39 Eliz. B. R.* *Croke, n. 26.* the earl of *Lincoln's* case (*k*), a *capias pro fine* an *exigent* shall issue, for the king is to have a fine, and the same reason is upon an indictment of trespass or riot, and much more in the case of felony.

(i) *Cro. Eliz.* 170.

(k) *Cro. Eliz.* 503.

In an appeal by writ against principal and accessory, because the writ is general and distinguisheth not which is principal and which accessory, the process by *capias* shall go against them all; but if the defendants make default, the plaintiff in the appeal ought to declare which is principal and which accessory before the *exigent* issues, and then the *exigent* shall go only against the principal, and if he distinguisheth it not, but prays an *exigent* against all, he is concluded to charge any as accessory.

But in an appeal by bill or an indictment, the bill or indictment declares which is principal and which accessory, and there indeed the process by *capias* is against them all, but when it comes to the *exigent*, the *exigent* shall issue only against the principal, and process continue by *capias infinite* against the accessory, till the principal be outlawd, and then an *exigent* to issue against the accessory, because then the principal is attaint by outlawry; and if the accessory appear upon the *capias*, he shall be let to bail, and have *idem dies* by bail till the process be determind against the principal, and this was the common law, but farther settled by the statute of *Westm. 1. cap. 14. 2 Co. Instit. p. 183. and Stamf. P. C. Lib. II. cap. 17. fol. 69 & 70.*

If *A.* and *B.* be indicted as principals in felony, and *C.* as accessory to them both, the *exigent* against the accessory shall stay as before, till both be attainted by outlawry or plea. *40 Affiz. 25. & 7 H. 4. 36. b.* for it is said, if one be acquitted, the accessory is discharged, because indicted as accessory to both, and therefore shall not be put to answer till both be attaint. *2 Co. Instit. 183. Plowd. Com. 99. b. dubitatur*; for tho *C.* be accessory to both, he might have been indicted as accessory to one, because the felonies are in law
 [201] several, but if he be indicted as accessory to both, he must be prov'd so. *4 Co. Rep. 44. b. Vauxe's case. 47. b. Waite's case, 2 Co. Instit. ubi supra*; but *vide 9 Co. Rep. 119. a. lord Sanchar's case contra per totam Curiam.*

Nota the diversity seems to be between an accessory to two principals in an appeal, there he shall not be convict, if he be only accessory to one; but if *A.* and *B.* be indicted as principals, and *C.* be indicted as an accessory to both, if he be found accessory to one, he shall be convicted, because the king's suit; *quare 8 H. 5. 6. b. 9 Co. Rep. 119. a. lord Sanchar's case (*)*.

(*) *Vide supra, Part I. p. 624.*

III. As to writ of *exigi facias*, and the return thereof.

If the defendant render himself to the sheriff before the *quinto exactus*, and appear in court at the return of the *exigent* and plead, and is bailed to attend the trial, and then make default, the inquest shall not be taken by default in any case of felony, either upon an indictment or an appeal, tho it may in other cases, but a new *capias*, and after that an *exigent* shall issue, and a *capias* against the bail. 19 E. 3. *Exigent* 10.

If an *exigi facias* be delivered to the sheriff, and there are but two county-courts before the return, and the sheriff return the first and second *exactus* & *non comparuit*, and that there were no more county-days between the delivery of the writ to him and the day of the return, there may issue a special *exigi facias* with an *allocato comitatu*, if it be prayed, after the return, and before any new county-day be past, but if any county-day be past between the last of the former county-days and the return, no *exigi facias* shall issue with an *allocato comitatu*, but an *exigi facias de novo*, for the demand of the party must be at five county-courts successively held one after another without any county-court intervening, 22 E. 3. 11. a. so if after the second *exactus* the offender render himself and finds mainprise, and at the day of the return makes default, *exigi facias* with an *allocato comitatu* shall issue, because three county-days intervened, but a new *exigent* and a *capias* against the bail, 22 E. 3. *ubi supra*, and 32 E. 3. [202] *Exigent* 14.

And therefore in *London*, where the holding of the hustings is uncertain, no *exigi facias* shall issue with an *allocato husting'*, because the court cannot take notice of the set times of holding it, as they may of the times of holding the county-court. 21 E. 3. 35. b. 17 E. 3. 43. b. *Exigent* 11. but *vide contrarium* at this day an *allocato husting'*, H. 19 Jac. B. R. *Archer* and *Dalby* (1), where it was agreed, that if an *exigent* issues in *London*, and they begin in husting *de placito terræ*, (as they may) they shall proceed along at that hustings to the outlawry, without mingling their hustings *de communibus placitis*; but if an *allocato husting'* comes, they shall proceed without omitting any husting.

If the offender appear at the *capias* and pleads to issue, and is then let to bail to attend his trial, and then make default, the inquest in case of felony shall never be taken by default, but a *capius ad audien-*

(1) *Palm.* 278.

dam juratam shall issue, and if he be not taken, an *exigent*, *vide* 26 *Aff.* 51. *Coron.* 196. and if he appeared upon the *exigent* and then made default, an *exigi facias de novo* shall issue. 16 *Aff.* 13.

But, if upon the *capias* or *exigent* the sheriff returns *cepi corpus*, and at the day hath not his body, the sheriff shall be punished, but no new *exigent* awarded, because in custody of record. 30 *Affiz.* 23. but if the party be returned outlawd, the process thereupon is a *capias utlegatum*.

And that I may say is once for all, as well this process of *capias utlegatum* as all other process upon an indictment, and generally all process for the king are with a *non omittas propter aliquam libertatem*.

And therefore, by virtue of these processes, the sheriff may enter into any liberty to execute the same.

And if the party be in his own house, or in the house of any other, if the doors be shut, and the sheriff having given notice of his process demand admittance and the doors be not opened, he may break open the doors and enter to take the offender. 5 *Co. Rep.* 91. *b.* *Semayne's case*, & *libros ibidem*.

[203] Nay farther, if a party outlawd be in a house, and the door be refused to be opened, the constable, or any other person in pursuit of the felon, may break open the doors and apprehend a person outlawed or indicted of felony.

The return of the outlawry must be certain.

It must shew where the county-court was held, and in what County, therefore *ad comitatum meum S. tent. apud C.* and says not *in comitatu prædicto* or *in com' S.* is erroneous. 11 *H.* 7. 10. *a.* *dubitatur*.

The like if it be *ad comitatum meum tentum apud S. in com' Somers'*, and says not *ad comitatum meum Somers'*, or *ad comitatum Somers'*, without saying *ad comitatum meum Somerset.* *P.* 7. *Jac. B. R.* adjudged, *Whiting's case (m)*. 6 *H.* 7. 15. *b.* 11 *H.* 7. 10. *a.*

And yet in that case at the desire of the king's attorney, in case of an outlawry of felony a *certiorari* issued to the coroners to certify the truth, and thereupon the return was amended according to a like precedent in the time of *E. 4. T. 3 Car. B. R. Plum's case (n)*,

The sheriff must return the day and year of the king to every *exactus*.

If the day and year of the king be inserted in the 1, 2, 3 and 5 *exactus*, but omitted in the 4th *exactus*, it is erroneous, and shall not be

(m) 2 *R. A. p.* 802. *pl.* 2.

(n) *Palm.* 480. *Latch* 210.

supplied by intendment. *M. 14 Jac. B. R. Chapman's case* adjudged (o).

So if it be *anno regni dominæ reginæ* without saying *Elizabethæ*, or *dominæ Elizabethæ* without saying *reginæ*. *P. 7 Jac. C. B. Burford's case* (p) and *Brandling's case* (q), or *anno regni domini regis Jacobi* without saying *regni sui Angliæ*, for the year of *England* and *Scotland* differ. *H. 7. Jac. Pen's case* (r), so if there be less than a month between the first and second *exactus*. *H. 13 Jac. B. R. Taverner's case* (s).

Ad husting tent' apud Guildhall civitatis London without saying *de communibus placitis* is erroneous, because they have two hustings, one *de communibus placitis*, another *de placitis terræ*. [204]
6 *H. 7. 15. b. 11 H. 7. 10. a.*

So if an *exigent* be against *A. and B.* and the return is *primo exacti fuerunt & non comparuerunt* without saying *nec eorum aliquis comparuit*, it is erroneous. *H. 13 Jac. B. R. Taverner's case* adjudged (t), & *sæpius alibi*.

If there be two coroners in a county, the calling upon the *exigent* may be by one of them, and likewise one alone may give the judgment of outlawry. 14 *H. 4. 34. b. per Hankf. 39 H. 6. 40. b.*

But it seems the return must be by two in ministerial acts. 14 *H. 4. 34. b. 39 H. 6. 40. b.*

The name of the coroner must be subscribed to the judgment of outlawry at the *quinto exactus*. *M. 9 Car. B. R. Ethrington's case* upon an outlawry of felony, and it must be subscribed also by the name of their office *A. B. and C. D. coronatores*, unless in *London*, where the mayor is coroner. *M. 13 Jac. B. R. Earle's case* (u). *P. 17 Jac. Croke, n. 11. Garrard's case* (x).

The sheriff's name and office must also be subscribed to the return of the *exigent*, e. g. *A. B. armiger, vicecomes*.

IV. As to the effect of the *exigent* or outlawry in treason or felony.

1. As to the *exigent* the very issuing of the writ of *exigent* in case of treason or felony gives to the king or the lord of a franchise, to whom that liberty is granted, the forfeiture of all the goods of the party so put in *exigent* from the time of the *teste* of the writ of *exigent*. 41 *Affiz. 13.*

(o) 2 *R. A. p. 803. pl. 1.*

(p) *Ibid. p. 802. pl. 6.*

(q) 2 *R. A. p. 802. pl. 74*

(r) *Ibid. p. 802. pl. 8.*

(s) *Ibid. p. 802. pl. 5.*

(t) 2 *R. A. p. 802. pl. 1.*

(u) *Ibid. p. 802. pl. 3 & 4.*

(x) *Cro. Jac. 531.*

And therefore, if in an appeal the *exigent* be well awarded, tho the writ of appeal be abated, the forfeiture of the goods by the *exigent* stands in force. 43 E. 3. 17. b. *Stamf. P. C. Lib. III. cap. 22. fol. 184. b.*

And tho the outlawry be reversed for error in law or in fact, as if the party were imprisoned at the time of the outlawry and after the *exigent*, whereby the outlawry is reversed, yet the *exigent* being well awarded the forfeiture of the goods stands. 19 E. 3. Forfeiture 19. 30 H. 6. *ibid.* 31.

And therefore a special writ of error lies even upon the award of the *exigent* for the party so put in *exigent* or his executors to reverse the award of the *exigent*, if it were erroneously awarded for error in law or error in fact. *M. 33 & 34 Eliz. B. R. Marshe's case adjudged*, cited in *Foxley's case*, 5 Co. Rep. 111. a. but not without reversal by writ of error. *Ibid.* As if he were in prison, or beyond the sea, or had a charter of pardon before the *exigent* awarded, and thereupon the very award of the *exigent* shall be reversed, and the party restored to his goods, and so it is for matter of law, as if the *exigent* issued against the accessory before the principal attainted. *Stamf. ubi supra.*

But the avoiding only of the outlawry avoids not the *exigent* if well awarded, nay altho the party render himself after the *exigent* awarded, and plead to the indictment, and is found not guilty, yet the forfeiture by the *exigent* stands in force. 22 Affiz. 81.

Therefore it is necessary for a party outlawd in felony to bring his writ of error specially *tam in adjudicatione brevis de exigi facias, quam in promulgatione utlegariæ*, for tho the outlawry be reversed, it doth not reverse the award of the *exigent*.

But error in the *exigent* is cause to reverse the outlawry, and error in the appeal or indictment, upon which the *exigent* is awarded, is cause to reverse both outlawry and *exigent*.

But without a judgment of reversal in a writ of error the forfeiture by the *exigent* awarded stands, tho the indictment be quashed or the appeal abated, because the king's title being of record must be avoided by a record, and so are the books of 41 Affiz. 13. 43 E. 3. 17. b. to be reconciled, *vide Foxley's case, ubi supra.*

2. As touching the forfeiture by outlawry. Outlawry of treason or felony is a conviction and attainder of the offense charged in the indictment.

And

And as the award of the *exigent* gives the forfeiture of the goods, so the outlawry gives the forfeiture or loss of the lands of the party outlawd, *viz.* in case of outlawry of treason his lands are forfeited to the king, of whomsoever they are held, and in case of outlawry of felony to the lord by escheat, of whom they are immediately holden.

But it must be remembred, that the bare judgment of outlawry by the coroners without the return thereof of record is no attainder, nor gives any escheat. *Co. Lit.* §. 197. *fo.* 128. *b.* 28 *Affiz.* 49.

But it must be returned by the sheriff with the writ of *exigi facias*, and the return indorsed,

And therefore, if there be a *quinto exactus*, and thereupon *utlegatus est per judicium coronatorum*, but no return thereof is made, there lies a writ of *certiorari* to the coroners, 9 *H.* 4. 7. *b.* 36 *H.* 6. 24. *b.* *Dy.* 223. *a.* or to the sheriff and coroners, *Register* 284. *a.* 38 *E.* 3. 14. *b.* *vide Dy.* 317. *a.* to certify the outlawry into the king's bench, but this is only either to ground a charter of pardon upon it, 9 *H.* 4. 7. *b.* or to amerce the sheriff, where he returned only a *quarto exactus* when it was *quinto exactus*, 36 *H.* 6. 24. *b.* but of what effect it is otherwise, there seems diversity of opinions: I think as followeth.

1. That it doth not disable the party to bring an action, because in relation to party and party it stands as nothing, till returned by the sheriff. *Mich.* 14 & 15 *Eliz.* *Dy.* 317. *a.* *Puttenham's* case.

2. That consequently, barely upon such a return of an outlawry upon a *certiorari*, without the writ of *exigent* indorsed and returned together with the *certiorari*, it seems no writ of escheat lies for the lord; *quære.*

3. But if the writ of *certiorari* be directed to the sheriff and coroners, and the writ of *exigent* be extant in court, and they return this outlawry, possibly this may be a sufficient warrant to enter it of a record, as a return upon the *exigent*, for the king's advantage, and to issue upon it a *capias utlegat'*. 38 *E.* 3. 14. *b.* to have the forfeiture of his goods. 14 & 15 *Eliz.* *Dy.* 317. *a.* *Co. Lit.* *fol.* 288. *b.* 37 *H.* 6. 17. *a.* *vide Proctor's* case. *P.* 5 *Eliz.* *Dy.* 223. *a.* [207]
And *Stanley's* case there cited out of 18 *E.* 4. to this purpose.

4. But unless the writ is some way returned or extant, I think it gives the king no title to land or goods, for the writ of *exigi facias*

is the warrant of the outlawry, and *that* which gives the coroners their authority in such a case to give judgment of outlawry.

And it is not like the case, where there was once a writ and return of outlawry, and the record since lost, for that upon circumstances a jury upon the general issue may find a record, tho not shewn in evidence; but here the writ was never in truth indorsed nor returned.

5. But if the writ of *certiorari* were directed to the coroners alone, tho it may be a ground to cause the sheriff to mend his return and make it according to the truth, yet the certificate of the coroners will not make a record to intitle the king or lord to any thing without the writ of *exigent* extant, and the return upon it amended by the sheriff, for without the *exigi facias* and the return of the outlawry upon it, I think there is neither disability, forfeiture, nor escheat, and therefore *P. 8 Jac. C. B.* a *certiorari* shall not be so much as granted to the coroners to remove an outlawry after the parties death. Sir *John Fit's* case.

V. Touching the avoiding of the outlawry, it is to be done either by plea or by writ of *identitate nominis*, or by writ of error.

1. By plea, where the record of the outlawry is not avoided but made good against another person, as where the outlawry is against *J. S. de B.* and the party taken upon it is another person of another addition, as *J. S. de C.* or *J. S. junior*, &c. *vide 19 H. 6. 58. a. 10 E. 4. 16. a. 20 H. 6. 19. a.*

2. By writ of *identitate nominis*, *vide F.N.B. 267. 20 E. 3. Brief 683. 14 H. 4. 27. a.*

3. By writ of error, for it is a judgment of record and must be avoided by record.

The errors assignable are either errors in law, whereof before, or errors in fact, which are many, as if the party outlawd were an infant under fourteen years old in case of felony. *Dy. 104. b.*
[208] *3 H. 5. Utlagarie 11.*

So if he were imprisoned at the time of the outlawry, unless being brought to the bar and demanded, if he will appear, and he refuse it. *M. 8 Jac. C. B. 1 H. 7. 13. 21 E. 4. 73. b.*

As touching avoiding of an outlawry of felony, because beyond the sea. *H. 15 Jac. B. R. Carter's case (y)*, these differences were

(y) 2 R. A. 804, pl. 2, 3, 4, 5.

agreed by the court, whereby the differing books are reconciled upon view of divers precedents.

1. If a man having committed a felony goes beyond the sea voluntarily, or upon his own occasions, and not in the king's service before any *exigent* awarded, tho after the indictment, and then an *exigent* is awarded, and the offender being beyond the sea is outlawd for the felony, he may assign it for error.

2. But if after the *exigent* awarded upon the indictment of felony, then he goes beyond the sea voluntarily or upon his own occasions, and being so beyond sea is outlawd, he shall not avoid it by such being beyond sea, because the *exigent* awarded gives him notice of the prosecution, and by such a means he may avoid his conviction by staying till all the witnesses are dead.

3. But if *prima facie* the error in that case is well assigned, by alleging he was *ultra mare tempore promulgationis utlegariæ*, and if he were in the realm after the *exigent* issued, it shall come in by the plea of the king's attorney to shew it.

4. But if he were within the realm at the time of the *exigent* issued, and went beyond sea upon the service of the king or kingdom, and then is outlawd being beyond sea, this outlawry shall be reversed, and if the party allege generally, that he was *ultra mare tempore promulgationis utlegariæ*, and the king's attorney reply, that he was in *England tempore emanationis brevis de exigi facias*, it is a good replication for the plaintiff in the writ of error to allege, that he went out after the *exigent* and before the outlawry pronounced upon the king's command or service, and shew it specially, and so confess and avoid the plea.

And it is to be observed, that altho the death of the king doth not discontinue the indictment, yet the king's death [209] pending the process and before the outlawry discontinues the process, and this is not aided by the statute of 1 E. 6. cap. 7.

Upon a writ of error upon an outlawry in felony, the record of the outlawry *cum omnibus ea tangentibus* is removed into the king's bench, wherein these things are observable.

1. That the party outlawd must render himself in custody, and in custody must come in person to the bar, and when he is demanded what he can say, he is in person to pray allowance of the writ of error.

2. The

2. The writ being allowd the record is to be removed, namely the indictment, process, and return, and outlawry, he is then to assign his errors in person, and a day is given to the king's attorney to reply to him, and in the mean time a *scire facias* to the lords mediate and immediate is to issue returnable at fifteen days *ad audiendum errores*.

3. If any lords do appear, they may plead to the errors; if the sheriff return there are no lands, &c. then the court proceed to examine the errors.

4. The outlawry being reversed he is put to answer the indictment, and may plead to it, and be tried at the king's bench bar, or the record may be remitted into the country, if it were removed into the king's bench by *certiorari*, with a command to the justices below to proceed by the statute of 6 H. 8. cap. 6. *de quo supra*, p. 3.

[210]

C H A P. XXVII.

Touching certiorari out of the king's dominions.

THO a writ of *certiorari* be not properly or directly a process upon an indictment, yet it has relation to it, and in order to the full understanding of the pleas of the crown is necessary to be considered.

The king's bench is the sovereign ordinary court of justice in causes criminal, and therefore may issue a *certiorari* unto inferior justices to remove indictments or appeals, and that is done for several ends.

1. Sometimes to consider and determine the validity of indictments, and to quash or affirm them, as there is cause.

2. Sometimes to have the prisoner or offender tried either at the bar, or by *nisi prius* before the king's justices of the courts of *Westminster*.

3. Sometimes to examine, and affirm or reverse the proceedings and judgments given by inferior judges, for it was frequent heretofore to have the record removed by *certiorari* first, and then a writ of error, *quod coram vobis residet*, tho it is now ordinarily done together by writ of error.

4. Sometimes to plead the king's pardon.

5. Some-

5. Sometimes to issue process of outlawry against the offender in those counties and places where the process of inferior justices cannot reach them.

Tho this be usual to remove records of indictments by *certiorari*, yet the chancellor may deliver an indictment removed before him, or the justices of peace, or other commissioners of *oyer and terminer* or gaol-delivery may deliver indictments taken before them *manibus propriis* without writ, and such a record so removed, and a record made of it removes the record.

If there be an indictment to be removed and the party be in custody, it is usual to have an *habeas corpus* to remove the prisoner, and a *certiorari* to remove the record, for as the *certiorari* alone removes not the body, so the *habeas corpus* alone removes not the record itself, but only the prisoner with the cause of his commitment, and therefore altho upon the *habeas corpus* and the return thereof the court can judge of the sufficiency or insufficiency of the return and commitment, and bail or discharge, or remand the prisoner, as the case appears upon the return, yet they cannot on the bare return of the *habeas corpus* give any judgment, or proceed upon the record of the indictment, order, or judgment, without the record itself be removed by *certiorari*, but the same stands in the same force it did, tho the return should be adjudged insufficient, and the party discharged thereupon of his imprisonment, and the court below may issue new process upon the indictment, tho it be otherwise in an *habeas corpus* in civil causes, for it is a *superfedeas*, and closeth up the hands of the inferior court in civil causes. [211]

By the statute of 1 & 2 of P. & M. cap. 13. an *habeas corpus* or *certiorari* to remove a prisoner or a recognisance ought to be signed with the proper hand of the chief justice, or in his absence by one of the justices of the court, out of which it issues.

By the statute of 21 Jac. cap. 8. all *certiorari*'s to remove indictments before justices of the peace, shall be deliverd at the quarter-sessions in open court, and the party indicted shall become bound with sufficient sureties in ten pounds to the prosecutor, with condition to pay him such charges as the justices of peace shall assess, if the party be convicted, otherwise the justices of peace may proceed to trial notwithstanding such *certiorari*.

A *certiorari* may issue to the justices of a county palatine, or to the mayor of the *cinque ports* to remove an indictment taken before them,

and

and must not be directed to the chancellor of *Durham*, &c. or warden of the *cinque ports*, for now by the statute of 27 H. 8. cap. 24. all commissions of the peace, gaol-delivery, oyer and terminer, &c. are to be made in the king's name, and these justices in criminal [212] causes are immediately subject to this court, as other justices of like nature elsewhere are; and if they return a privilege of the county palatine or *cinque ports* upon the *certiorari*, it shall not be allowed, but an *aliàs certiorari* shall issue with a precept to produce their charters, by which they claim such exemption, *P. 43 Eliz. B. R. Rot. 119. T. 3 Car. B. R. (a)*, and *M. 8 Car. B. R. (b)* upon an indictment of sodomy in the *cinque ports. T. 1653. Rutabie's case* upon an indictment of murder in *Durham (c)*.

A *certiorari* issues bearing *teste* the last day of *Trinity term* to remove all indictments against *A. and B.* returnable *tres Michaelis*; at the quarter-sessions it is deliverd, and then an indictment is found against *A. B. and C.*

Ruled 1. That tho the delivery of a *certiorari* supercedes the proceeding upon an indictment, yet it doth not hinder the taking of an indictment after the delivery of the writ.

2. Altho the indictment be taken after the *teste* of the *certiorari*, and before or after the delivery thereof, yet all such indictments against *A. and B.* ought to be removed, and the justices below cannot proceed upon such indictments to trial, judgment, or execution; and if they do, it makes their proceedings erroneous and void, and likewise subjects the justices to an attachment for the contempt, whether they proceed at the same sessions, or a private sessions after.

3. That such a *certiorari* to remove all indictments against *A. and B.* removes all indictments wherein *A. or B.* are indicted either alone or together with any other person. *M. 22 Car. 1. B. R. Orfener's case (d)* adjudged. 1 R. 3. 4. b. 6 H. 7. 16. a.

If *A. B. and C.* are indicted (suppose for a battery), ruled, 1. Tho *A.* alone tenders security for the costs, it is sufficient within the statute, and the record ought to be removed into the king's bench. 2. If the indictment be at a private sessions, this indictment ought to be deliverd into the quarter-sessions, yet the delivery of the *certiorari* at

(a) *Hopkil Tilden's case*, 1 R. A. 395. pl. 6.

(b) *Dugdale's case. ibid.*

(c) *Vide supra, Part I. p. 467. and also*

Simpson's case, 1 R. A. 395. pl. 5.

(d) The same points resolved in *Cheney's case*, 1 R. A. 395. pl. 1, 2.

the private sessions closeth the hands of the justices, altho the allowance of the writ and the tender of the security must be by the statute at the quarter-sessions. *M.* 1653. *B. R.* adjudged.

Nota, T. 15 *Car.* 1. *B. R.* in *Hancock's* case these points were resolved. 1. That if many are indicted, and one only tenders sureties for the costs upon the statute of 21 *Jac.* it is sufficient.

2. If the surety be sufficient as to 10*l.* that is a sufficient surety, and ought to be allowed by the justices of peace.

3. A *feme covert* is not within the statute of 21 *Jac.* to find sureties.

4. If a *certiorari* issue and ought to be allowed, the proceeding of the justices after is *coram non judice*.

5. It was resolved *M.* 4. *Car.* that the removal of an indictment of forceable entry by the prosecutor is not within the statute of 21 *Jac.*

And so note a difference between a writ of error and a *certiorari*, the former is a *superfedeas* to the issuing of execution from the time of the delivery of the writ till the day of the return be past, but then if the plaintiff proceed not to the removal of the record, execution shall be granted for his delay; but a *certiorari* is a *superfedeas* from the time of the delivery thereof for ever, unless a *procedendo* issue. 21 *H.* 6. 28. *b.* *Dy.* 245. *a.*

If at the sessions of the peace an indictment of forceable entry be, and restitution be awarded, and after the sessions and before restitution actually made a *certiorari* is delivered to one justice of peace, before the statute of 21 *Jac.* it closed up their hands, and no restitution shall be awarded, but the justice ought to make a *superfedeas* thereupon.

And it seems the same law still remains at this day upon indictments of forceable entry found at private sessions, because the justices make execution thereupon before any quarter-sessions come by virtue of the statute of 8 *H.* 6. *cap.* 9. and if the *certiorari* should not be obeyed, it would be fruitless.

If *A. B. C.* and *D.* be actually indicted in one indictment for one offense, and a *certiorari* be to remove all indictments against *A.* and *B.* this will be sufficient to remove the indictment [214] against *A.* and *B.* and also it removes the indictment as to *C.* and *D.* for the justices may deliver the indictment *per manus proprius.* *M.* 37 & 38 *Eliz.* *B. R.* *Woodward's* case, *contra* 6 *E.* 4. 5. *a.*

But if the indictment be but one, but the offenses several, as if *A. B. C.* and *D.* be indicted by one bill for keeping several disorderly houses, a *certiorari* to remove this indictment against *A.* and *B.* re-

moves not the indictment as to *C.* and *D.* for tho they are all comprised in one bill, yet they are several indictments and several offenses, and so the record is in the king's bench virtually and truly as to *A.* and *B.* but as to *C.* and *D.* the record remains below.

But if the justices *per manus suas proprias* deliver the bill into court against all of them as they may, then if a record be made of that delivery, the indictment is entirely removed against *A. B. C.* and *D.* because not done upon the writ of *certiorari*, but *per manus suas proprias*: But otherwise it is, where the offenses are several, and the indictment against *A.* and *B.* is removed by writ, and by a return indorsed upon the writ, for then that single indictment, that concerns *A.* and *B.* is removed, and not the others, where the offenses are several, and severally charged.

But as I said, if there be one indictment against *A. B. C.* and *D.* for one murder or burglary, another against the same persons for robbery, and a third against the same persons for a rape, a *certiorari* to remove all indictments against *A.* and *B.* removes all these several indictments against *A. B. C.* and *D.* for tho in law each of them be severally a felon, yet inasmuch as they are jointly charged they shall be all removed as to *A. B. C.* and *D.* by virtue of this one writ, contrary to the opinion of *Markham. 6 E. 4. 5. a.*

And yet in some cases variance between the *certiorari* and the record causeth the record not to be removed, as if the *certiorari* be to remove the record of an inquisition *in curiâ nostrâ*, whereas it was *in curiâ* of the predecessor, the record is not removed. *3 Eliz. Dy. 206. b.*

[215] So if it be to remove an indictment for stealing of two horses, and the record is but for one. *3 Affiz. 3. Plow. Com. 393. a.*

If a *certiorari* issue, it is a *superfedeas* in law, and it makes judicial proceedings after the *certiorari* delivered erroneous, but possibly it makes ministerial proceedings, as the award of restitution in a forceable entry, void also; *vide 6 H. 7. 16 a. per Keble*, altho it doth not remove the record before the return. *Dy. 245. a.*

After a *certiorari* issued and delivered, and before the record removed the inferior judge may be enabled to proceed by a *procedendo* or *superfedeas* of the *certiorari* issuing out of the court of king's bench.

But if the record be removed and filed in court, at common law no *procedendo* could be granted, neither could the record be remitted, but now by the statute of *6 H. 8. cap. 6.* the court of king's bench may remand

remand the record, and command the judges below to proceed upon the indictment so remitted.

And *note* the difference between a *certiorari* in the king's bench and chancery: In the king's bench the very record itself is removed, and that which remains in the court below is but a scroll. But usually in chancery, if the *certiorari* be returnable there, they remove but the tenor of the record, and therefore if the tenor of a record of an indictment, or attainder, or conviction be removed by *certiorari* into the chancery, and thence sent by *mittimus* into the king's bench, they cannot thereupon proceed either to judgment or execution, because they have only the tenor of the record before them, and not the record itself, as in the former case. *Vide* 37 H. 6. 17. 39 H. 6. 4. Dy. 217. a. 2 E. 3. 21. a. (c).

(c) *Vide* Dyer 369. b.

Burn. Tit. Certiorari. 4. Blackf. Com. ch. 19. p. 262. 265. 272. ch. 24. pa. 320, 321. Index to 2 Hawk. P. C. Tit. Certiorari. See the several Index's of 1, 2, 3, & 4. Reports of Sir James Borrow, & Rep. tempt. Lord Hardwicke 396.

C H A P. XXVIII.

[216]

Touching the arraignment of offenders in capital offenses.

IN the former chapter I have shewed how the prisoner is to be accused, namely, by indictment, and how to be brought in by process to his answer, and how to be dealt with, if he make default, or stand out against the process of law.

I am now to consider how he is to be proceeded against, if he be taken, or render himself, and appear in court.

For in case of an indictment of treason or felony no offender can appear by attorney, but in person, tho in some cases of other indictments after plea pleaded, the defendant may appear by attorney. 9 E. 4. 4. a. 22 Affiz. 73. B. Attorney 63.

When the offender in treason or felony comes into court, or is brought in by process, sometimes of *capias*, and sometimes of *habeas corpus* directed to the gaoler of another prison, the first thing that follows thereupon, is his arraignment.

And herein I will consider, 1. What the arraignment of a prisoner or malefactor is. 2. How it is performed, and in what manner. 3. When it is to be done.

I. Arraignment therefore is nothing else but the calling of the offender to the bar of the court to answer the matter charged upon him by indictment or appeal.

And the word in *Latin* is no other than *ad rationem ponere*, and in *French* *ad reson*, or abbreviated *a resn*, for as the *vox forensis* *disrain* or *derayn* used antiently in our books *de ceo tend suit* & *derayne* imports in *Latin* *disrationare* to disprove or evince the contrary of any thing, that [217] is or may be affirmed, see *Spelman's Gloss.* tit. *Dirationare*, and *Selden's* notes upon *Fortescue*, cap. 21. p. 23. so arraigne is *ad rationem ponere* to call to account or answer.

And this appears to be the true sense and etymology of the word, by the excellent record of the reversal in parliament of the judgment given against the *Mortimers*, E. 2. the reversal and whole record is entered *verbatim* *Patents* 1 E. 3. part 2. m. 3. where there are three errors assigned in that arbitrary judgment, and all ruled in parliament to be errors, and the attainder reversed. 1. *Quòd cum aliquis de regno regis tempore pacis deliquerit erga dominum regem vel alium, per quod debeat vitam vel membrum perdere, & super hoc coram iudicibus in iudicium ductus fuerit, primò debeat poni rationi & super delicto sibi imposito responsiones ipsius audiri, prius quam procedatur ad iudicium de eo; sed in recordis & processibus prædictis continetur, quòd prædicti Rogerus & Rogerus coram justic' ducti adjudicati fuerunt iudicio tractus & suspendii, & postea perpetuæ prisonæ adjudicati & mancipati absque hoc, quòd ipsi fuissent inde arrenati, seu quòd ipsi ad aliqua eis imposita respondere possint, quod est contra legem & consuetudinem regni, &c. per quod ad iudicium de eis erronecè processum est.*

2. *Dicit etiam quòd in recordis & processibus prædictis continetur, quòd dominus rex recordabatur versus ipsos Rogerum & Rogerum, quòd ipsi hostiliter equitaverunt cum Humfredo de Bohun nuper com' Heref. & aliis inimicis domini regis contra ipsum regem & populum regni sui diversa mala & facinora perpetrando, quare iudicia prædicta super eisdem reddita fuerunt, cujusmodi recorda non est domino regi facere, nisi de inimicis suis tempore guerræ, & hoc, viz. quando idem dominus rex equitat cum vexillis explicatis, & non tempore pacis, sed eo tempore dominus rex non equitavit cum vexillis explicatis, nec fuit tempore guerræ, cancellario domini regis & justiciariis placearum de utroque banco sedentibus*

bus ad justitiam unicuique conqueri volenti & prosquenti faciend', per quod ad judiciam de eis, ut prædictum est erroneè processum est. 3. Dicit etiam quòd erratum est in hoc, quòd, cum in Magna Charta de libertatibus Angliæ continetur, quod nullus liber homo capiatur, aut imprisonetur, aut de libero tenemento suo disseisietur, vel de libertatibus vel liberis consuetudinibus suis, aut utlegatur, aut exulet, aut aliquo modo destruatur, nec dominus rex super eum ibit, nec super eum [218] mittet, nisi per legale iudicium parium suorum vel per legem terræ, sed in recordis & processibus prædictis continetur, quòd prædicti Rogerus & Rogerus sigillatim iudicio tractus & suspendii adjudicati fuerunt, & postea perpetuæ prisonæ adjudicati & mancipati absque legali iudicio parium suorum ad hoc vocatorum, & contra legem terræ. And there-upon judgment of reversal is given in these words, *Et quia inspectis recordis & processibus prædictis compertum est in eisdem, quòd prædicti Rogerus Mortimer & Rogerus Mortimer coram justic' ducti iudicio tractus & suspendii adjudicati fuerunt, & postea perpetuæ prisonæ adjudicati & mancipati absque hoc, quòd ipsi ad aliqua eis vel eorum alteri imposita possint respondere, & hoc tempore pacis, & absque hoc, quod dominus rex equitavit cum vexillis explicatis, & cancellario domini regis & justic' de utroque banco sedentibus, ut prædictum est, & absque legali iudicio parium suorum, quod est contra legem & consuetudinem regni Angliæ & tenorem Chartæ prædictæ, consideratum est per dominum regem nunc & ejus concilium in pleno parlamento, quod omnia iudicia prædicta ob defectus & errores prædictos & alios in recordis & processibus prædictis compertos revocentur, &c.*

I have transcribed the record more at large, because there are many useful parts in it, some whereof will be useful to other purposes.

But as to the business in question, these two things are observeable. 1. What arraignment is, namely, it is *ad rationem ponere*, for that which in one part of the record is *arrenatus*, is before rendered *rationi ponere*, to be put to answer; and therefore *Spelman*, who is seldom mistaken, is yet herein mistaken, both in the nature, orthography, and etymology of the word, which he saith is *arriamare* or *adrhamire*, for it is nothing so. 2. Of what importance, and how essential it is, that in capital offenses the offender being in court should be arraigned or put to answer; the want whereof rendered the judgment given against the *Mortimers* erroneous, and reversed by the king and his parliament.

The arraignment of a prisoner, therefore, consists of these parts:

1. The calling the prisoner to the bar by his name, commanding him to hold up his hand, which tho it may seem a trifling circumstance, yet it is of importance, for by holding up his hand *constat de personâ indictati* and he owns himself to be of that name (a).

2. Reading the indictment distinctly to him in *English*, that he may understand his charge.

3. Demanding of him whether he be guilty or not guilty; and if he pleads *not guilty*, the clerk joins issue with him *cul. prist*, and enters the prisoner's plea; then he demands how he will be tried, the common answer is, *by God and the country*, and thereupon the clerk enters *po. sc*, and prays to God to send him a good deliverance.

But if the prisoner hath any matter to plead either in abatement, or in bar of the indictment, as *misnomer*, *auterfoits acquit*, *auterfoits convicted*, a pardon, &c. then he pleads it without immediate answering to the felony: but in some cases *si trove ne soit*, then to the felony *not guilty*, *de quo postea*. And thus far what the arraignment is.

II. How to be done or performed.

On the part of the court, what is to be done is shewn before, but in relation to the prisoner and his coming to the bar.

The prisoner, tho under an indictment of the highest crime, must be brought to the bar without irons, and all manner of shackles or bonds. *Stamf. P. C. fol. 78. a. 2 Co. Inst. 316. Co. P. C. p. 34, 35. Braet. Lib. III. fol. 137. a. & alios libros ibi*, unless there be a danger of escape, and then they may be brought with irons.

But *note*, at this day they usually come with their shackles upon their legs, for fear of an escape, but stand at the bar unbound, till they receive judgment (b).

[220] III. When the party is to be arraigned.

In case of murder at the common law, the judges did usually forbear to arraign the prisoner upon an indictment till the year and day were past, whether an appeal were depending or not *per omnes justic' Angliæ*, 22 E. 4. *Coron. 44.* unless the evidence were very clear

(a) The ceremony of holding up the hand is not required in the case of a peer, nor is it of absolute necessity in the case of a common person, it being sufficient that it appears to the court who is the person indicted. See lord *Delamere's* case, *State Tr. Vol. IV. p. 211.* and lord *Mobun's* case, *State Tr. Vol. IV. p. 508.*

(b) By this it appears to have been our author's opinion, that upon whatever occasion a prisoner be brought into court, he

ought not to stand there *in vinculis* till after his conviction, when he comes to receive judgment, nor even at the time of his arraignment, (for that is the time our author is here discoursing of), yet in *L.ayer's* case, *Mich. 9 Geo. 1. B. R.* a difference was taken between the time of arraignment, and the time of trial; and accordingly the prisoner in that case stood at the bar in chains during his arraignment. See *State Tr. Vol. VI. p. 230, 231.*

to convict him, and no appeal depending: or altho an appeal were depending, if the appellant were an infant. 21 E. 3. 23. b. *Stamf. P. C. fol. 107. a.* because of the delay.

But now by the statute of 3 H. 7. cap. 1. the justices shall proceed to try him upon an indictment of murder (or manslaughter) tho within the year, and if acquitted, yet he shall not be discharged, but at the discretion of the justices shall be continued in custody, or upon bail, till the year and day be past.

So that by this statute *auterfoits acquit* of principal or accessory, or *auterfoits attain* of the principal upon an indictment is no bar to an appeal, but *auterfoits acquit* upon an appeal remains a bar to an indictment for the same offence.

But *auterfoits convict* upon an indictment, and having had his clergy, is a good bar to an appeal notwithstanding this statute, *de quo infra*; and yet in favour of an appeal, if a man be indicted of murder, and plead to it, and be convict, if the wife enter an appeal for the same death against the prisoner, as long as that appeal is depending, judgment shall be respited; but if the wife be nonsuit in her appeal, then judgment shall be given upon the conviction. *Vide M. 12 & 13 Eliz. B. R. Dy. 296. a. Stanley's case.*

But as to other indictments, as of robbery, &c. the same remain at common law, as before this statute, yet it is the constant course, unless an appeal be depending, to arraign the prisoner upon an indictment within the year; for now by the statute of 21 H. 8. cap. 11. the party robbed hath as effectual restitution of his goods upon his prosecution of an indictment, as upon an appeal; and so an appeal of robbery is rarely brought. [221]

Nay, tho an appeal of robbery be brought by writ, the justices will not stay the arraignment of the prisoner upon the indictment, unless it be by bill, or that the plaintiff in an appeal by writ hath declared upon the writ, because the writ is general, and it cannot appear what the goods are till declaration; but in an appeal of death by writ the person killed is certain, 31 H. 6. 11. a. *Stamf. P. C. Lib. II. cap. 36. fol. 107. a.*

If a man be indicted and appealed before the same justices for the same murder or other felony, the party shall be arraigned upon the appeal first, and not upon the indictment, in favour of the appellant, as I have said; but if the appellant be nonsuit upon his appeal, the pri-

soner shall be arraigned upon the appeal (*c*), and process shall cease upon the indictment. 4 E. 4. 10. a. And it shall be entered *cesset processus* upon the indictment, 4 E. 4. 10. a. And if the prisoner plead, and be acquitted, or plead the king's pardon, and it be allowed, regularly the acquittal or pardon, and the allowance thereof shall be entered upon the appeal, tho it be safe to enter it likewise upon the indictment; and therefore if in that case, thro the mistake of the clerk, there be no entry of *cesset processus* upon the indictment, and the indictment lying thus open, there be process of outlawry made upon the indictment, and the party be outlawed, he hath no remedy but to bring a writ of error upon the outlawry, and he may assign for error his acquittal upon the appeal, and aver it to be the same felony, and upon confession of the king's attorney, it shall be reversed. 4 E. 4. 10. a.

If there be an inquisition before the coroner of murder, and returned, and likewise an indictment for the same offense by the grand inquest, it is usual to arraign the prisoner upon the indictment, but he may be arraigned upon both at the same time; but if arraigned upon the indictment only, there ought to be an entry of *cesset processus* upon the coroner's inquest as to the prisoner, who may otherwise be outlawd upon it.

[222] If a prisoner be found guilty of murder by the coroner's inquest, and a bill of indictment of murder be against him at the sessions of gaol-delivery for the same murder, it is usual to arraign him upon the coroner's inquest, and not upon the indictment, and if he be acquit upon that, then to arraign him upon the bill, and put him to his plea of *autrefois acquit*.

But to avoid the trouble of a double arraignment and plea, I have observed this course.

1. If one indictment be of manslaughter, and the other of murder, then to arraign him of that offense, which is highest, and spare the other.

2. If both be of murder, but one is insufficient, as for the most part coroners inquests are, then to arraign him upon the good indictment, and quash the other.

3. If both presentment and indictment be of the same nature, and both (for instance) of murder, and both good, and both returned into court the same sessions, I have usually arraigned the prisoner upon both (so as they be put upon the same inquest to be tried), to avoid

(c) At the suit of the king.

the trouble of the plea of *auterfoits acquit* or *attaint*, and to indorse his acquittal or attainder upon both presentments, always directing the jury to acquit him upon both, if acquitted upon one, and *e converso*.

Now concerning the arraignment of the accessary; regularly the accessary shall not be arraigned, nor put to answer till the principal be attaint by outlawry or confession, or be convict, and attaint also by judgment upon verdict; for it is an offense dependant upon the principal; and altho the principal be convict, yet if he have his clergy, the accessary is discharged thereby, and shall not be arraigned. 2 *Co. Inst.* 183. *super stat. Westm' 1. cap. 14.*

But yet the principal and accessary being indicted by one or several indictments, and both appearing, may be arraigned together at the same time (*d*), and both pleading not guilty, the same jury shall be charged with both, and directed to inquire of both, [223] *viz.* first of the principal, and if they find him guilty, then to enquire of the accessary 9 *Co. Rep.* 119. *a.* lord *Sanchar's* case. 2 *Co. Inst.* 184. *super stat. Westm' 1. cap. 14.*

But if *A.* and *B.* be indicted for murder, *A.* as giving the stroke, and *B.* as being present, aiding, and abetting, if *A.* flies, and *B.* is apprehended, *B.* may be arraigned and tried before *A.* be attainted by outlawry, tho he be principal but in the second degree, for they are both principals; and so it was done in the case of *Thady*, *H. 25 & 26 Car. 2.* tho in point of discretion it is good to try them both together.

If *A.* be indicted of high treason, and *B.* be indicted for receiving or comforting him, or procuring, or abetting (but not present), here it is true they are all principals; but in as much as *B.* in case of a felony would have been but accessary, and it is possible that *A.* may be acquitted of the fact, it seems to me, that *B.* shall not be put to answer of the receipt or procurement till *A.* be outlawd, or at least jointly with *A.* (*e*), and in this case the same jury may be charged with both, and their charge shall be first to inquire whether *A.* were guilty, and if not, then to acquit both *A.* and *B.* and if *A.* be found guilty, then that they inquire of *B.* And in *Somervill's* case, 26 *Eliz.* (*f*), mentiond before, the inquiry was first of the principal offender, and then of the receiver or procurer to avoid that inconveni-

(*d*) They may be, but not necessarily must, as was laid down for law by C. J. *Pemberton* in the trial of Count *Ceningmark*. See *State Tr. Vol. III. p. 465.* and Sir *John Hawke's* remarks thereon, *State Tr. Vol. IV. p. 199.*

(*e*) Yet in lady *Lisle's* case, *State Tr. Vol. IV. p. 105.* it was without any foundation in law practised quite contrary. *Vide supra, Part. I. p. 238. in notis.*

(*f*) 1 *And* 109.

ence and *awerouſt*, that might happen in caſe *B.* were firſt convict of the procurement and receipt, and yet poſſibly *A.* might be acquitted of the principal fact.

If the principal do not plead *not guilty*, but ſome other plea, as in abatement, or in bar, the acceſſary ſhall not be put to plead till the plea of the principal be determind. 9 *H.* 7. 19. *b.* but if the principal plead *not guilty*, then the acceſſary, if preſent, ſhall be put to plead preſently, and they may be tried by the ſame inqueſt, *ut ſupra*.

[224] In antient time, if the principal made default, and appeared not, the acceſſary was not put to answer. 44 *E.* 3. 7. *b.* *Coron.* 216. But of later times the acceſſary, if he appear, hath been arraigned and put to plead, but proceſs againſt the inqueſt, and trial ceaſeth till the principal come in or be attaint by outlawry. 9 *H.* 4. 2. *a.* 7 *H.* 4. 36. *a.* *Stamf. P.C. Lib. I cap. 49. fol. 46. a.*

But the acceſſary may pray proceſs againſt the principal, & *renunciari juri pro ſe introducto*, and his conſent makes it not error, 8 *H.* 5. 6. *b.* *Coron.* 463. and therefore, if the acceſſary be acquitted before the principal tried, it is agreed, that it is a good acquittal, and by the ſame reaſon, if he were convict, it is a good conviction, yet no judgment ſhall be given againſt him upon that conviction till the principal tried.

And upon this reaſon it is, that if *A.* be arreſted or in priſon for felony, and *B.* reſcue him, or the gaoler ſuffers him voluntarily to eſcape, tho this be a diſtinct felony in *B.* the reſcuer, and in the gaoler that voluntarily ſuffers him to eſcape, for which they may be preſently indicted, yet they ſhall not be arraigned or put to answer till *A.* be convicted and attaint by judgment, or outlawd. 1 *H.* 7. 6. *a.* 1 *E.* 3. 16. *b.* 2 *Co. Inſtit.* 592. *ſuper ſtat. de frangentibus priſonam*; for if *A.* be acquitted upon the indictment, the reſcuer or gaoler ſhall be diſcharged.

But if *A.* be indicted of the felony, or not indicted, and be lawfully imprifond and break the priſon, he may be indicted and arraigned for his felony in breaking the priſon, before his conviction of the felony for which he was committed. 2 *Co. Inſtit. ubi ſupra*.

And yet, if after that indictment *A.* be arraigned of the principal felony, and acquitted, he may plead that acquittal of the principal felony in bar to the indictment for the breach of priſon; *vide rationem ſupra, Part I. cap. 54. p. 611.*

If a *capias* be awarded against a felon, and he render himself and plead not guilty, and is let to bail, and then makes default, a *capias ad audiendam juratam* shall issue; and if he be brought in, he shall be brought in upon his plea, but it is said by *Scot*, that if he had rendred himself upon the *exigent*, and pleaded not guilty, [225] and been let to bail till the trial, and then made default, whereupon an *exigent* is awarded, and the felon is brought in upon the *exigent*, he shall plead *de novo*, and consequently be arraigned *de novo*, for by the *exigent* awarded, the first issue is discontinued, 16 *Affiz.* 13.

See 4 Blackf. Comp. ch. 25. Of arraignment and its incidents, Burn. Tit. Arraignment and Index to 2 Hawk. P. C. tit. Arraignment.

CHAP. XXIX.

Concerning the plea of the prisoner upon his arraignment, and first of his confession of the fact charged, and approving others.

WHEN the prisoner is arraigned, and demanded what he saith to the indictment, either he confesseth the indictment, or pleads to it, or stands mute, and will not answer.

The confession is either simple, or relative in order to the attainment of some other advantage.

That which I call a simple confession is, where the defendant upon hearing of his indictment without any other respect confesseth it, this is a conviction; but it is usual for the court, especially if it be out of clergy, to advise the party to plead and put himself upon his trial, and not presently to record his confession, but to admit him to plead. 27 *Affiz.* 40.

If it be but an extrajudicial confession, tho it be in court, as where the prisoner freely tells the fact, and demands the opinion of the court, whether it be felony, tho upon the fact thus shewn it appear to be felony, the court will not record his confession, but admit him to plead to the felony *not guilty*, 22 *Affiz.* 71. *Stamf. P. C.* [226] *Lib. II. cap. 51. fol. 142. b.*

A con-

A confession in order to some other advantage, is either where the prisoner confesseth the felony in order to his clergy, *de quo infra*, cap. 44. or where he confesseth the offense, and appealeth others thereof, thereby to become an approver, and thereupon to obtain his pardon, if he convict them, and this lets in the whole learning touching approvers and approvement, which I shall here open in the order that Mr. *Stamford* hath gone before me.

1. Of what offenses a man may be an approver. 2. In what suits. 3. At what time. 4. Before whom. 5. In what manner. 6. How he shall be orderd before and after his appeal. 7. What process shall issue against the party appeald. 8. What pleas he shall have, and how tried. 9. How proceeded in. 10. What judgment shall be given for or against the appellor or appellee.

Before I come to these particulars, we are to know, that it is purely in the discretion of the court to admit the approver to appeal or not, or to give him any respite from judgment or execution upon his confession and approvement; for otherwise it would be in the power of any party arraigned for felony by becoming an approver to delay judgment, where (it may be) his appeal is but feigned, for the admission of his appeal or respite of judgment is but a matter of grace and discretion. 21 H. 6. 34. b. *Coron.* 66 & 67. *per omnes justic' utriusque banci.* Co. P. C. cap. 56. p. 129.

And therefore this course of admitting of approvers hath been long disused, and the truth is, that more mischief hath come to good men by these kind of approvements by false accusations of desperate villains, than benefit to the public by the discovery and convicting of real offenders, gaolers for their own profits often constraining prisoners to appeal honest men, and therefore provision made against it by 1 E. 3. cap. 7.

And upon this reason it is, that as of later times the admission of such appeals hath been wholly disused, so in times when they were admitted, a great strictness was held upon such appeals, as [227] will appear upon the examination of the ensuing particulars.

I. Therefore touching the offenses, whereof an approvement may be.

It may be only of capital offenses, as of treason or felony, whether they be at common law, or by act of parliament.

When a prisoner is admitted to be an approver, he is sworn in court to approve, or rather to discover all felonies and treasons that he knows,

knows, and a certain time prefixt (as three or four days), to make his appeal, and a coroner assigned to him to receive such his appeal and discovery. 12 E. 4. 10. b.

And yet the appeal is not good as an appeal, or as an approvement to compel the parties appealed to answer, but only as to such felonies or treasons that were committed by the appellee together with the appellor, and whereof the appellor stands indicted in court, and as to other treasons or felonies, [than] whereof the appellor so stands indicted, it is no legal appeal or approvement to put the appellee to answer.

And therefore if *A.* being indicted for robbing of *B.* and he appeal *C.* that he robbed *A.* himself, this is a void appeal, and the appellor shall be executed, and the appellee shall not be put to answer to it. 25 E. 3. 39. (a).

So if he appeal *C.* as accessary to the robbery of *B.* either before or after, *C.* shall not be put to answer, for it is not the same felony charged upon *A.* but only an accessary to it. 10 E. 4. 14. a.

So if *A.* be indicted of felony, and he appeal *B.* of treason, *B.* shall not be put to answer that appeal; but *B.* being so accused, it may be a ground for the justices in point of discretion to make *B.* find sureties for his appearance at the next sessions, or in the king's bench, and in the mean time to be of good behaviour towards the king and his people, as was done when a person that had abjured for felony, made such an appeal of treason. *M.* 19 E. 2. *Coron.* 387. *vide simile* 21 E. 3. 18. a. *Coron.* 449.

II. In what suits.

Approvement lies not in an appeal of felony, for the de- [228]
lay that may come thereby to the plaintiff. *M.* 15 E. 3. *Coron.* 113. 2 R. 3. 22. b. And therefore, if a party be indicted of felony, and the prisoner becomes an approver, if an appeal for the same felony be sued afterwards, all proceedings upon the approvement shall stay. 8 H. 5. *Coron.* 442.

But if *A.* be indicted of felony, and he becomes an approver, and appeal *B.* as a companion with him in the same felony, and *B.* comes in, it seems he may not become an approver, and appeal *C.* of the same felony, 15 E. 3. *Coron.* 113. *Stamf. P. C. Lib. II. cap. 58. fol. 147. a.* tho 11 H. 4. 93. b. *B. Coron.* 34. seems to be contrary.

(a) *N. Edit.* of the year books, fol. 82. b.

If a man be arrested and imprisond for suspicion of felony, he cannot become an approver, because he is not indicted. *Stamf. P. C. Lib. II. cap. 55. Co. P. C. cap. 56. p. 129.* against the opinion of *Strange* and *Hankf. 6 H. 6. Coron. 231.*

III. At what time a man shall become an approver.

After a person is abjured for felony, 19 *E. 2. Coron. 387. 19 E. 3. Ibid. 443.* or be outlawd, 21 *E. 3. 17. b. Coron. 452.* or otherwise attaint, and hath his clergy, 17 *E. 3. Coron. 445.* he shall not be admitted to be an approver; nor one convict by verdict. 19 *H. 6. 47. b. Coron. 8.*

If *A.* be indicted of felony, and plead *not guilty*, and put himself upon the country, and the jury is charged with him, yet before the evidence fully heard, and the jury gone from the bar, he may be admitted to be an approver. 12 *E. 4. 10. b. 11 H. 7. 5. b. per omnes justic' : vide contra 2 H. 7. 3. a. (b), 9 H. 5. Coron. 440.*

But if the whole evidence be heard, then he shall not be admitted to be an approver, 21 *E. 3. 18. Coron. 449. 2 H. 7. 3.* so that it seems much in the discretion of the court to admit him to be an approver

[229] at any time before verdict given, tho after *not guilty* pleaded, 12 *E. 4. 10. b. in B. R. & 11 H. 7. 5. b. per omnes justic'*, which is of greater weight than the other books.

IV. Before whom a man may become an approver.

It may be before the justices of the king's bench, or justices of gaol-delivery, or justices in *eyre*, for they may assign a coroner to the prisoner to receive his appeal.

But it cannot be in inferior courts, as those that have *foke* and *sake*, and *infangtheft*, and *utfangtheft*. *Braet. Lib. III. cap. 35.*

But in case of a royal franchise, as a county palatine, or the royal franchise of *Ely*, where the bishop hath justices and coroners of his own making, there a felon may become an approver. 29 *E. 3. 42. a. Coron. 462.* in the case of *Ely*.

Neither can a man become an approver before justices of peace, nor *oyer* and *terminer*, for they cannot assign a coroner. 9 *H. 4. 1. Coron. 457. 4 Co. Instit. 165. 169. Co. P. C. 130.*

V. The manner of approver, and of the allowance of it.

(b) In this case the whole evidence had been given, and the jury gone from the bar, which was one reason assigned by the court, why they could not admit the prisoners to become approvers; so that this

case no way contradicts what is before said; but there was another exception besides, on which the court laid the greatest stress, because they only prayed a coroner, but did not acknowledge the felony.

Before

Before any man shall be admitted to be an approver, he must confess the indictment in open court, and pray a coroner to be assigned him, and regularly this is to be done upon his arraignment, before plea pleaded, tho, as hath been said, his confession hath been sometimes admitted after *not guilty* pleaded. 11 *H.* 7. 5. *b.* 12 *E.* 4. 10. *b.* and therefore if he hath pleaded before *not guilty*, and then prays a coroner without confessing the felony, the inquest shall be taken, and if found guilty he shall be executed. 2 *H.* 7. 3. *a.* adjudged; and if he hath not pleaded to the country, but prays a coroner, and will say no more, he shall have *peine fort & dure*, tho the book of 1 *H.* 5. *Coron.* 441. be that he shall be hanged.

Upon confessing the felony, and praying a coroner to be assigned, the court doth these things.

1. They assign him a coroner to take his appeal. 2. They prefix him a time to make his appeal, sometimes three, sometimes four days. 8 *H.* 5. *Coron.* 439. 12 *E.* 4. 10. *b.* 26 *Affiz.* 19. 3. He shall be removed out of the strait custody, and make his appeal before the coroner, that he may not have any just pretence to say it was by duress or constraint, 12 *E.* 3. *Coron.* 169. and therefore, [230] if upon the coming back of the approver to the court, he wave his appeal, as being made by duress and against his will, the coroner shall be examined touching it upon oath; and if he affirm it was made *de bon grée*, the appeal shall stand, but the approver shall be hanged. 22 *E.* 3. *Coron.* 255. 12 *E.* 3. *Coron.* 169. 4. The coroner must put his appeal into form, and when the prisoner comes back into the court, he must repeat his appeal, and shall not be helped by the court or any by-stander, 26 *Affiz.* 19. and if he miss in repeating his appeal in any matter of moment, as the colour of the horse, &c. he shall be hanged; for if he mistake in such circumstances, which must need come from his own memory and information, it is a sign it is feigned. 5. If he make not his appeal before the coroner in the time prefixt, he shall be hanged; and if he make it, and disavow it when he comes into the court, he shall, upon the examination of the coroner upon oath, be hanged. 6. If he appeal one, who by his own confession is not in the kingdom, he shall be hanged. 2 *E.* 3. *Coron.* 153. for he cannot be attaint at his suit. 7. After his appeal made he shall have an allowance of 1*d.* *per diem* by the book of 12 *E.* 4. 10. *b.* 26 *Affiz.* 19. 8 *H.* 5. *Coron.* 439. three half-pence
per

per diem per Britton, and by *Fortescue* 21 *H.* 6. 34. *b.* nothing at all, till he hath convicted the appellee.

VI. Touching process upon an appeal by an approver.

It is to be known, that altho a coroner cannot receive an original appeal but of such felonies as are committed in that county whereof he is coroner, yet if a felon become an approver, the coroner may take an appeal of any felony, tho committed in a foreign county. 9 *H.* 5. *Coron.* 437.

Altho it seems, that book is not law, for he can appeal only in the county where he is indicted, and he cannot be indicted in one county of a felony committed in another county, therefore *quære librum*; it seems it must be intended where *A.* is indicted in the county of *B.* and taken in the county of *C.* and there the coroner receives his confession and appeal, which possibly he may do without any [231] special assignment *virtute officii*, as he may take an abjuration of a prisoner in a foreign county.

But the coroner in that case cannot make process against the appellee in a foreign county, 29 *E.* 3. 42. *a.* *Coron.* 462. but he may in the same county, *Stamf. P. C.* 146. *a. b.*

And therefore the bishop of *Ely* having the royal franchise of *Ely*, and justices and coroners of his own, and also having franchise of *retorna brevium* in divers hundreds in the county of *Suffolk*, and likewise a gaol there, a felon indicted and in prison at *Ely* became an approver before the coroner of the franchise of *Ely*, and appealed one in the bishop's gaol in his hundred in the county of *Suffolk*, the coroner of *Ely* cannot make process to the bishop's bailiff of his liberty in the county of *Suffolk* to bring the appellee to *Ely*, which is in another county, *viz.* *Cambridgeshire*, adjudged 29 *E.* 3. 42. *a.* *Coron.* 462.

At common law it seems, if an approver appeal parties that are demurrant in a foreign county, there could be no process made but in the king's bench, by removing the record thither by the justices of gaol-delivery, before whom the parties became an approver.

But this is remedied by the statute of 28 *E.* 1. *de appellatis*, whereby power is given to justices of gaol-delivery to issue process to the sheriffs of foreign counties to take the appellees, and bring them before the justices in that county where the appellor is indicted.

If the appellor allege the place, whereof the appellees are, (as he must), and thereupon process issues to the sheriff of that county, and he return there are no such persons in his bailiwick, 25 *E.* 3. 42. *b.*

or

or *non sunt inventi*, 21 H. 6. 34. b. the approver shall have judgment and be executed, and he shall not be received to say they are in another county, and pray process thither. 22 E. 3. Coron. 460. for if he be once found false in what he saith, he shall not be credited in any thing, but his appeal shall be presumed untrue: *vide* 21 H. 6. 34. b. Coron. 456.

If the approver die before his appeal determin'd, or be executed for the felony, 21 E. 3. 18. a. 21 E. 3. 17. b. Co- [232] *ron.* 452. or hath the advantage of his clergy, 3 E. 3. Coron. 369. or disavows his appeal, and will not prosecute it, 21 H. 6. 34. b. 3 H. 6. 50. b. yet process shall be continued against the appellee at the king's suit, and the appellee, if he come in, shall be arraigned, for the appeal was well commenced, and it stands as an indictment, by reason of the great presumption that a man that confesseth himself guilty, would not charge another falsely to be companion with him in the same felony.

But if the appeal were never well commenced, as if the appellor were convicted by verdict or outlawry, *de quibus infra*, or if the king pardons the approver after the approvement made, and before trial, 47 E. 3. 16. a. *Stamf. P. C. fol.* 149. a. the appellee shall be discharged without arraignment at the king's suit, or further process upon the appeal; for now the approver having his pardon is sure to escape, and therefore shall not be trusted in his prosecution against another for the same felony. But of these matters farther under the next head.

If the appellee be returned *non inventus*, the appellor, as hath been said, may be executed, but process of outlawry shall issue against the appellee, as it seems not by one *capias* and *exigent*, but by *capias, alias, pluries* and *exigent*; *quære*.

VII. Touching proceedings upon the appeal after appearance of the appellee.

He that is appeal'd shall not be let to bail but in three cases: 1. If the approver be dead. 2. If the person appeal'd be of good fame. 3. If the appellor wave his appeal. *Westm. 1. cap.* 15. (a). *Stamf. P. C. Lib. II. cap.* 18. *Fol.* 74. a. b.

And therefore, if *A.* be severally appeal'd by two approvers, *B.* and *C.* indicted severally of several felonies, and *A.* join battle, and van-

(a) 2 Co. Instit. p. 188a

quish *B.* yet he shall not be let to bail till the appeal of *C.* be determined. 25 *E.* 3. 42. *b.*

[233] When the appellee comes *in* he may take his legal exceptions to the insufficiency of the appeal, as that the appellor is not in prison but at large, 21 *E.* 3. 18. *a.* *Coron.* 448. 6 *H.* 6. *Coron.* 231. or that the appellor is within age, or above seventy years old, or a woman, or maimed, whereby the appellee loseth his trial by battle. *Stamf. P. C. cap.* 58. *fol.* 147. *b.* or that he is a clerk convicted, and hath not made his purgation. 17 *E.* 3. 13. *a.* or that he is abjured the realm. 19 *E.* 2. *Coron.* 387. or that he was convicted by verdict before he appealed of the same offense: *Vide Co. P. C. cap.* 56.

Also he may have all those exceptions, which an appellee at the suit of a lawful person either by writ or bill may have, as that the plaintiff is outlawd for another felony, or in a personal action, but if he hath obtained his pardon, the appellee shall be put to answer, as in another appeal. 21 *E.* 3. 17. *b.* but if the approver be pardoned *that* felony, upon which he makes his appeal, the appellee shall not be put to answer neither at the party's suit, nor at the suit of the king. 47 *E.* 3. 16. *a.* *ubi supra.*

If the appellee hath no exceptions to the appeal, or to the disability of the appellor, but pleads to the felony, he may put himself upon trial, either by battle, or by the country.

Touching the form of the trial by battle, I shall make no long narrative at this time, because it is an unusual trial at this day, and besides, it will come more aptly in another place.

If when battle is joined they come to the combat, and the appellee be vanquished, it is an attainder of the appellee, and the appellor shall have the benefit of the king's grace and a pardon *tanquam ex merito justitiæ.*

But if the approver appeals several persons, and they severally join battle, the appellor shall not have his pardon till he vanquish them all successively, for if he be vanquished by the last, or disavow his appeal against the last, he shall be executed. 41 *E.* 3. *Coron.* 98. 21 *H.* 6. 34. *b.* *Coron.* 456.

And *note*, that, if in the field when they come to battle, the appellor disavow his appeal, the approver shall be executed, and the appellee deliverd without being arraigned at the king's suit, for his dis-

disavowing in the field is *quasi* a trial in fact. 21 *H.* 6. 34. *b.* *Coron.* 456. *Stamf. P. C.* 148. *a. b.*

But if before the deraigning of battle the approver disavow his appeal, the approver shall be hanged, but the appellee shall be put to answer at the king's suit, for it may be the king hath other evidence besides the approver to convict him.

If *A.* becomes approver, and appeals *B. C.* and *D.* of the same felony, and in his combat with *B.* becomes recreant, *B.* shall be discharged, but the appeal shall stand against *C.* and *D.*. 41 *E.* 3. *Coron.* 98.

If three be indicted for the same felony, and they become approvers, and the appellee joins battle with them all, he shall perform it severally; but if he vanquish one of the appellants, he is thereby acquitted against all the rest, and the approvers shall be executed, and the appellee deliverd. 7 *E.* 3. 12. *a.*

But if the appeal be of several felonies, tho he vanquish one appellant, he must fight successively with the rest. 19 *H.* 6. 35. *a.* 47 *E.* 3. 5. *a.* for the charges are several by the several appellants.

If the appellee puts himself upon trial *per patriam*, the approver shall be sworn as well to the petit jury upon the trial when he gives his evidence, as well as make a general oath at the time of his first becoming approver, and hence he is called *probator*, (*quod tamen quære*, because he is a person convict,) so that altho he were a partner in the offense, and tho he stand indicted of it, and tho he be convicted by his confession, yet he is admitted a witness upon his own accusation or appeal, and the reason is, because he accuseth himself by his confession, as well as he doth the appellee by his appeal, and therefore gains a probable credibility of his testimony.

And therefore *P.* 19 *Jac.* in the star-chamber, *Noye's Rep.* p. 154. in Sir *Percy Cresby's* case, one defendant, that accuseth not himself, is not admitted as a witness to convict his companion, but if he accuse himself, he is a witness against his companion.

But this testimony or evidence is not conclusive to the jury, for the jury may consider as well the credibility or not [235] credibility of the witness, as the matter he swears.

And altho it seems it is now no plea for the appellee to say, he is *boni nominis & famæ, & in franco plegio & in assisâ domini regis, & habet dominum, qui ipsum advocet*, as it was in *Bracton's* time, it is

good evidence for the the prisoner, if there be no other evidence against him but the testimony of the approver; and therefore, if the appellor die, yet the king may proceed with the appeal, because tho he cannot have the testimony of the approver himself, yet there may be other evidence of the fact.

But yet, when the approver is dead after his appeal, and before trial, the party isailable, because much of the evidence, which may conduce to the conviction, namely the oath of the approver, is lost, and so less probability of his conviction.

If the approver be vanquished and kild upon the place in the battle, or if the appellee be acquitted by verdict, yet a judgment must be entered upon his confession; for his bare confession of the felony is a conviction, it is true, but not an attainder tiil judgment given, *quòd suspendatur per collum*, which is not presently entered upon his becoming approver, but when either by trial, or for any other cause before shewn, the court thinks not fit to spare his execution.

And on the other side, if the appellee be convicted by verdict or battle, or slain upon the field, yet judgment must be given, *quòd suspendatur per collum*. 8 E. 3. Judgement 225. And in that case, altho the life of the approver is saved, yet he shall be banished, unless he obtain the king's pardon. *Stamf. P. C. Lib. II. cap. 52.* lord Coke *P. C. cap. 56.* saith he shall have a pardon *ex debito justitiæ*, And thus far concerning approvers.

I should now consider the business of abjuration, which is always accompanied with a confession of the felony before the coroner, but because *that* was a kind of appendant to sanctuary, which is wholly and finally taken away by the statute of 21 Jac. cap. 28. I shall not incumber myself with that business.

See Index to 2 Hawk P. C. tit. Pleading. Index to 2 Hawk. P. C. tit. Approver. Burn. tit. Approver. 4 Blackf. Com. ch. 25. p. 329. ch. 27. p. 346. ch. 33. 418. Index to 2 Hawk, P. C. Tit. Battel.

C H A P. XXX.

Concerning the pleas of the prisoner upon his arraignment, and first, concerning pleas in abatement of the indictment.

THE prisoner upon his arraignment either confesseth, or pleads, or stands mute; the first of these is dispatched in the former chapter, the second matter comes now to be considered, *viz.* his pleas upon his arraignment.

Pleas upon the arraignment are of four sorts.

1. Pleas that are declinatory of his trial, and such were antiently the plea of privilege of sanctuary, and the plea of clergy; the former is taken away by the statute of 21 *Jac. cap. 28.* the latter stands still in force; but because for the most part that benefit is claimed after conviction, and rarely before, I shall refer the whole business of clergy to a distinct examination, after I have done with the conviction of the prisoner.

2. Pleas in abatement of the indictment.

3. Pleas in bar of the indictment.

4. Pleas to the matter of the indictment, *viz.* *Not guilty.*

Now as to pleas in abatement of the indictment, they are of these kinds.

I. Such defects as arise upon the indictment itself, and the insufficiency of it, which hath been at large considered in the 24th chapter; if any such exception be taken by the prisoner, he may pray counsel to be assigned to him to manage his exceptions and take more; but he shall not have a copy of the indictment (*a*) from the court, but he and the counsel assigned may have *oyer* of the indictment, and press their exceptions upon it.

But it is rare to take any exceptions to indictments before conviction, unless upon indictments removed into the king's [237] bench by *certiorari*, which the court may in discretion hear or not hear, but remand the prisoner and the indictment.

And the reasons, why they are not taken in the country before conviction are, 1. Because he may have the same advantage of the

(*a*) But now by 7 *W. 3. cap. 3.* in all cases of treason, which works corruption of blood, or of misprision of such treason, the prisoner shall have a copy of the indictment.

exceptions after the trial and before judgment, as before trial. (*) And 2. Because if the exceptions appear material, the court can quash that indictment, and direct a new bill to be sent out to the grand jury, wherein these faults may be amended, and the prisoner arraigned *de novo*.

II. Such defects as are in matters of fact, as *misnosmer*, or false addition of the prisoner.

As to the plea of *misnosmer*: In appeals or actions between party and party, or in indictments, if the defendant plead *misnosmer*, he must be careful that he conclude not himself by the manner of his pleading.

Therefore, when *Alan Gerard* was committed upon a *capias* in felony, the pleading was *Et statim ductus ad barram in propria personâ, Et quæsitus quomodo se velit inde acquietare statim dicit, quod ipse habet nomen Johannis Allen, Et non Alani Gerard*, and pleads over to the felony *not guilty*, and the king's attorney replied, that *tempore indictmenti prædicti fuit Et adhuc est cognitus tam per nomen Alani Gerard, quam per nomen Johannis Allen, Et quod culpabilis est de felon' Et c. Et hoc petit quod inquiretur per patriam, Et c. ideo venit inde jurata, Et prædictus Alanus Gerard per nomen Johannis Allen traditur in ballium: Vide 6 H. 7. 7. a.*

In an appeal or other action at the suit of the party *misnosmer* is a good plea.

[238] If the defendant in an appeal or indictment plead *misnosmer* of his surname, the plaintiff or king may aver, *que conus per un nosme Et l'autre. 1 H. 7. 29. a.*

But in an appeal or action at the suit of the party, if *misnosmer* be pleaded of the christian name, the plaintiff must take issue, and cannot plead *conus per l'un nosme Et l'autre. 1 H. 7. 29. a. 21 E. 3. 47. b.*

In an indictment of felony if the prisoner plead *misnosmer* of his christian name, some books hold it a good plea. *11 H. 4. 41. b. Misnosmer 18. Stamf. P. C. Lib. 3. cap. 18. fol. 181. b.* but other books of greater and later authority be to the contrary. *1 H. 5. 5. b.*

(*) But now by 7 W. cap. 3. no indictment for high treason, whereby any corruption of blood may be made, or for misprision of such treason, nor any process or return thereupon shall be quashed for mis-writing, mis-spelling, false or improper *Latin*, unless exception be taken in

court before any evidence given upon such indictment, nor shall any such mis-writing, &c. be any cause to arrest judgment after conviction, but such judgment may nevertheless be reversed upon writ of error, as if this act had never been made.

Misnomer 9. *Coron.* 274. 3 *H.* 6. 26. a. (b), *B. Misnomer* 6. *per Rolf.*

It seems by the case of *Gerard* before cited, which was a record of a plea in the time of *E.* 4. tho the defendant may plead *misnomer* of his christian name, yet the king may aver *conus per l'un nosme & l'autre*, tho it be otherwise in an appeal, but in all cases of pleading *misnomer*, he must plead over to the felony: *Vide Dy.* 88. a. b. 21 *E.* 4. 71. a. b.

But, as hath been before said, there is little advantage comes by these pleas to the prisoner upon these reasons; 1. Because, if this exception be taken in the country at the gaol-delivery, the court may allow the exception, and direct a new bill according to what the prisoner says his true name or addition is, for, as hath been said, whosoever pleads *misnomer* or a false addition must give himself the true name and true addition by his plea, and *that* will be conclusive to him.

2. Because this plea of *misnomer* or untrue addition shall be always tried by the same inquest, that is to pass upon the prisoner, and is ready at the bar, and at common law should never be sent to be tried in a foreign county. 34 *H.* 6. 50. a. 1 *E.* 4. 3. a. tho the book of 5 *E.* 4. 2. a. as to the addition of place be contrary.

But however in all cases of indictments of felony, tho the plea in itself were a foreign plea, and triable in another [239] county, yet by the statute of 22 *H.* 8. cap. 14. (continued by 28 *H.* 8. cap. 1. made perpetual by the statute of 32 *H.* 8. cap. 3.) all foreign pleas shall be tried by a jury of the same county where the party is indicted, but *that* statute extends not to treason, nor to an appeal of felony, but 32 *H.* 8. cap. 2. extends to appeals of felony, but not to an indictment of treason, so that foreign pleas in case of indictments of treason stand as they did at common law. *Co. P. C.* p. 27.

And *note*, that regularly in all pleas, whether to the writ, or in bar by matter of record, or by matter of fact, or both, if the plea do not confess the felony, as the plea of a pardon in case of an indictment, or a release in case of an appeal, tho his plea be found against him by issue tried, or adjudged against him by the court, yet he shall not

(b) The case in 1 *H.* 5. 5. b. was a misnomer of the surname, and in the abridgement of that case, by *Fitzb. Coron.* 274. there is a *quære* added, *quære si soit en nosme de baptisme*, and in 3 *H.* 6. 26. a. it was

not the point of the case, but only said *obiter arguendo*; and *Gerard's* case is to the contrary. See also *Layr's* case, *State Tr.* Vol. VI. p. 237.

be convicted thereupon, but plead over to the felony *not guilty*, as well upon an indictment, as upon an appeal, and this *in favorem vitæ*, 22 E. 4. 39. *per cur.* 9 H. 4. 1. b.

III. A third sort of pleas in abatement by matter *dehors* is matter of record.

If *A.* be indicted of the murder of *B.* and there is another indictment afterwards taken of the same death against the same person, and he is arraigned upon the second indictment, because it is the king's suit the second shall not abate; yet usually the justices quash the other by judgment.

Yet *nota* the common course to prefer a new indictment of murder to the grand jury, altho an inquisition of murder be returned by the corener, and if the coroner's inquisition be insufficient indeed, it shall be quashed, but if sufficient, it is usual to arraign the prisoner upon both indictments, and an acquittal upon one shall be upon both; and this is done, because otherwise the coroner's inquest will stand as a charge on record against the prisoner, tho acquitted upon the indictment, and process of outlawry will issue thereupon.

So it is the constant use at this day to prefer two indictments upon the same killing against the same person, one of murder, and [240] the other of manslaughter upon the statute of 1 Jac. for stabbing, and the prisoner arraigned upon both pleads to both, and the jury charged with both, *viz.* that if they find him guilty of both indictments, to return it so, if not guilty of murder, yet to inquire whether guilty upon the other indictment.

If a duke, or an earl, or baron be indicted by a common name of *J. S. miles*, or *J. S. armiger*, he may plead the *misnomer* to the indictment, *viz.* that he is a duke, or an earl, or baron, or peer of the realm, *nient nosme*, &c. because that title is part of his name, and intitles him to be tried by his peers; but then he must shew forth a writ testifying it upon his plea pleaded, because it is but dilatory, and shall not be tried by the country, but by the record 35 H. 6. 46. a. *per Fortescue*. 6 Co. Rep. 53. a. countess of Rutland's case, *Per curiam*.

And thus far touching dilatory pleas.

See Index to 2 Hawk. P. C. Tit. Abatement.

C H A P. XXXI.

Concerning pleas in bar of an indictment of felony or treason, and first, of auterfoits acquit.

PLEAS in bar of the indictment of felony or treason are of two kinds, *viz.* 1. Such as are purely matters of record, or 2. Such as are mixt, partly consisting of matters of record, partly of matters of fact.

Of the former sort are the pleas of pardons, either general by act of parliament, or special by the king's charter.

But because the business of pardons is not only a large title and full of variety, but is also applicable to all offenses criminal, whether the party be indicted or not indicted, or whether con- [241] victed, or attainted, outlawd, or put in *exigent*, I shall reserve the discussion of pardons towards the end of this book.

Of the latter sort are many pleas consisting of matters of record and also matters of fact. And they are of these sorts principally.

1. *Auterfoits acquit* of the same felony.
2. *Auterfoits attain* or *convict* of the same felony.
3. *Auterfoits attain* of another felony.
4. *Auterfoits convict* of another felony and had his clergy.

Now as to the plea of *auterfoits acquit*, (as also *auterfoits attain de mesme felony ou treason*,) it consists of two kinds of matters. 1. Matter of record, namely, the former indictment and acquittal, and before what justices, and in what manner, *viz.* by verdict or otherwise; and 2. Matter of fact, namely, that the prisoner is the same person that was acquitted, that the fact is the same of which he was acquitted, and whereof he is now indicted. This plea, tho the prisoner ministreth rudely, yet counsel shall be assigned to him to put his plea in due form, because it is a special plea.

Mr. *Stamford* tells us, that the prisoner need not have the record of his acquittal *in poigne*, because the plea is not dilatory, but in bar, (and so in the other case of *auterfoits attain*, as it seems,) according to the difference taken by *Frowick*. 21 H. 7. 9. a.

But if that should be law, it were in the power of every prisoner to delay his trial as he pleaseth, by pleading *auterfoits acquit* or *attain* in another

another court, and so to put the king to reply *nul tiel record*, and then day given over to the next gaol-delivery to have the record, and to remove it by *certiorari* into the king's bench, if the trial be there, or the tenor of it by *certiorari* into chancery, and by *mittimus* into the court where the trial is.

For regularly, if a record be pleaded in bar, or declared upon in the same court, the other party shall not plead *nul tiel record*, but have
 [242] *oyer* of the record; but if it be in another court, he shall plead *nul tiel record*, and a day given to procure the certificate of the record, or the tenor thereof. 5 H. 7. 24. a. b.

But it seems, that for the avoiding of false pleas and surmises and to bring offenders to speedy trial in capital causes the prisoner must shew the record of his acquittal, or vouch it in the same court one of these ways.

1. By removing the tenor of the record of his acquittal into chancery by *certiorari*, and having it *in poigne*, or sent to the justices by *mittimus sub pede sigilli* and thus the prisoner pleading *auterfoits acquit* shewed the record of his acquittal *sub pede sigilli* 2 E. 3. 26 b. Coron. 150.

2. Or else if he be arraigned in the king's bench upon an indictment removed, or found before them, and were formerly acquitted of the same felony, either before justices of peace or gaol-delivery, the court will give him a writ of *certiorari* to remove the record before them, and respite his plea till he can remove his acquittal into the court, that so he may form his plea upon it, for the record is part of his plea, and thus it was done. 20 E. 2. Coron. 232. and thereupon his plea is put into form setting out the record in certain, *Et hoc vocat recordum acquietancie prædictæ coram ipso rege hic ad mandatum domini regis missum & coram ipso rege remanens*; and thus it is pleaded in 2 E. 4. in *Hodson's* case, who was arraigned in the king's bench for murder, and pleaded an acquittal before the justices of peace in *Lincolnshire*.

But it is to be observed, that the record must be removed by writ; for altho the king's bench may take an indictment or other record of the justices of peace *propriis manibus*, where it is to be proceeded on for the king, yet they cannot take a record of an acquittal to serve the prisoner's plea without writ. 8 E. 4. 18. b. 3 E. 3. B. Coron. 218.

If a man pleads *auterfoits acquit de mesme felonie*, and vouch the record, the court may examine proof, that it is the same felony, and thereupon allow it without any solemn confession by the king's attorney, 26 Affix. 15. But the safest way is the confession of the king's attorney,
 or

or an inquest charged to inquire, whether it be the same fact, *Vide R. Entries 385. a.* his plea allowed by the testimony of the justices of peace before whom he was acquit, *ideo consideratum est quòd prædictus B. de feloniam prædictam sit quietus & eat inde sine die.*

3. If the prisoner be indicted and arraigned in the country before justices of gaol-delivery, &c. and the prisoner pleads *autrefois acquit* of the same felony before the same justices in that county, or other justices of the same county, that were before them, then he concludes his plea, *Et hoc vocat recordum acquietancie, prædictæ coram præfatis justiciariis* at such a gaol-delivery; and if it be in the king's bench, he mentions the term and roll, and thus is the plea in 13 *E. 4. Clud's* case in the king's bench.

So that the prisoner, tho he doth not shew the record *sub pede sigilli*, yet he must plead it certain, and have the record in court and remove it thither, if it be not in the same court, and not expect till *nul tiel record* be pleaded, for it is part of the prisoner's plea, tho the court may favour him with time to procure the removal of the record.

Now the matter of fact of his plea consists in his averment, that he is the same person. and that the felony, whereof he was acquitted, is the same whereof he is indicted, which is issuable, and the king's attorney may take issue upon it, or confess it if it be true, and then thereupon judgment shall be entered, *quòd eat sine die*, or the court may examine proofs and allow it. 26 *Affiz. 15.*

But it is to be known, that there must not only be an acquittal by verdict, but a judgment thereupon, *quòd eat sine die*, for the bare verdict of his former acquittal is not a sufficient bar without a judgment pleaded also, tho the acquittal regularly is a warrant for entry of the judgment at any time after.

And note also, that a formal acquittal by judgment is not only a bar of a new indictment for the same offense, but if the party be outlawd upon that new indictment, he may assign his former acquittal for error in that outlawry, and reverse it for that cause, and in that case the judgment is not only for the reversal of the outlawry, but also farther, *quòd ipse tam de indictmento de morte & murthero prædicti &c. quàm de utlegariâ prædictâ eat sine die*, and such is [244] the judgment in *Clud's* case 14 *E. 4.* where that error is assigned to reverse the outlawry.

Now for the full declaration of this plea these things are considerable. 1. What shall be said the same felony whereof the party was acquitted.

acquitted. 2. What manner of acquittal there must be to make it a bar. 3. In what suits *auterfoits acquit* is a plea.

I. As to the first of these.

If *A.* and *B.* be indicted as principals in robbing or killing of *D.* and *B.* be convicted as principal, and *A.* be acquitted, if after this *A.* be indicted, as accessory after the fact, this formal acquittal as principal, is no bar, for it is another offense, 27 *Affiz.* 10. *Coron.* 200. 8 *H.* 5. 6. *b. Coron.* 463. *Stamf. P. C. fol.* 105. *a.*

But if *A.* be indicted as accessory before the fact, he may (as it is held,) plead *auterfoits acquit* as principal, because it is in effect the same offense. 2 *E.* 3. 26. *b. Coron.* 150. 282. but antiently the law was otherwise. 3 *E.* 2. *Coron.* 424. *Itinere Kant'.*

If *A.* be indicted in the county of *B.* for the murder of *C.* and it be supposed that the murder was committed 1 *Martii* 17 *Car.* and he be acquitted. and after indicted again in the same county, supposing the murder 21 *Car.* yet notwithstanding that variance he may plead *auterfoits acquit*, and aver it to be the same felony, for the day is not material, and besides the death is of a person certain, who can be but once killed. 3 *Affiz.* 15. 25. *E.* 3. *Coron.* 136. 22 *Affiz.* 55.

And the same law seems to be in an indictment of robbery, tho it is possible several robberies may be committed at several days, for still it lies in averment, that it is the same notwithstanding the variance.

If a man be indicted for the robbery or murder of *John a Stiles* and acquitted, and after indicted for the robbery or murder of *John a Nokes*, yet he may plead *auterfoits acquit*, and aver it to be the same person [245] notwithstanding the variance in the surname, for a man may have divers surnames, and he may aver, *que conus per l'un nomme & l'autre.* 26 *Affiz.* 15. *Coron.* 189. 11 *H.* 4. 41. *a.*

If *A.* be indicted in the county of *B.* for a robbery or other felony supposed to be done at *D.* in the county of *B.* and be acquitted, and be afterwards indicted for a robbery upon the same person in the county of *B.* but at another vill, yet he shall plead *auterfoits acquit* notwithstanding the variance of the vill, and may aver it to be the same; but if he be afterwards indicted in the county of *C.* for a robbery supposed to be committed in the same county of *C.* (as it must be,) he shall never plead *auterfoits acquit* of the same robbery in the county of *B.* for the justices in the county of *B.* can only inquire touching a felony in that county, and therefore it can never be averred to be the same, but it is said, that it is otherwise in an appeal. 4 *H.* 7. 5. *b.*

And

And therefore the book of 41 *Affiz.* 9. where an acquittal pleaded in a foreign county was allowd, must be intended of an indictment removed out of that county, where he was first indicted and acquitted.

If *A.* rob *B.* in the county of *C.* and carry the goods into the county of *D.* tho he cannot be indicted of robbery in the county of *D.* yet he may be indicted of larciny in the county of *D.* because the goods were carried thither; but suppose he be acquitted of larciny in the county of *D.* yet that acquittal is no bar to an indictment of robbery in the county of *C.* because it is another offense.

Nay it seems, it is no bar to an indictment of larciny in the county of *C.* for tho he be acquitted in *D.* it may be because the goods were never brought into that county, and so the felony in *C.* may not be in question, neither can the grand inquest or petit jury in the county of *D.* take notice of any felony committed in the county of *C.* and so the felony in *C.* is a distinct felony from *that* contained in the indictment in *D.*

If *A.* commit a burglary in the county of *B.* and likewise at the same time steal goods out of the house, if he be indicted of larciny for the goods and acquitted, yet he may be indicted for the burglary notwithstanding the acquittal.

And *è converso*, if indicted for the burglary and acquitted, [246] yet he may be indicted of the larciny, for they are several offenses, tho committed at the same time. And burglary may be where there is no larciny, and larciny may be where there is no burglary.

Thus it hath happened, that a man acquitted for stealing the horse, hath yet been arraigned and convict for stealing the saddle, tho both were done at the same time.

But if a man be acquit generally upon an indictment of murder, *auterfoits acquit* is a good plea to an indictment of manslaughter of the same person, or *è converso*, if he be indicted of manslaughter, and be acquit, he shall not be indicted for the same death, as murder, for they differ only in degree, and the fact is the same. 4 *Co. Rep.* 46. *b.* *Holcroft's case per cur'*, and upon the same reason *auterfoits acquit* upon an indictment of murder is a good bar to an indictment of petit treason, and *è converso*.

II. As to the second, what manner of acquittal is a good plea.

It must be an acquittal upon trial either by verdict or battle.

And

And therefore, if *A.* be accused and committed for felony, but no bill preferred, or *ignoramus* found, so that at the end of the sessions he is quit by proclamation, and delivered, yet he may be afterwards indicted. for he is not *legitimo modo acquietatus*.

If *A.* be assaulted upon the highway, or in his house by thieves or burglars to rob him, and he kill one of the thieves, which is no felony in law, and this matter be specially found by the coroner's inquest or grand inquest, whereupon he is discharged, yet he may be indicted *de novo* seven years afterwards for murder or manslaughter, and cannot plead the acquittal by the grand inquest.

But if he had been indicted generally of murder or manslaughter, and pleaded to it *not guilty*, and this special matter had been found by the petit jury, and thereupon judgment given, *quod eat sine die*, if he be afterwards indicted for the same fact, he may plead *auterfoits acquit*. *Crompt. fol. 28. a. Bull's case 26 Eliz.*

[247] Therefore it is no prudence to have the matter in any case found specially by the grand inquest or coroner's inquest, tho the fact being truly found by them amounts not to felony, as in the case before; and so *per infortunium*, or *se defendendo*.

If *A.* be indicted for felony, and be erroneously acquit by the mistaken direction of the judge, as, for that the felony was not committed the day mentiond in the indictment, yet that mistake lies not in averment, but to another indictment setting the day right he may plead *auterfoits acquit*. *2 Co. Instit. 318.*

If *A.* be indicted of murder or other felony, and plead *non culp.* and a special verdict found, and the court do erroneously adjudge it to be no felony, yet as long as *that* judgment stands unreversd by writ of error, if the prisoner be indicted *de novo*, he may plead *auterfoits acquit* and shall be discharged. *vide 9 H. 5. 2. b.* for it is the king's own suit, and tho the error appear, and regularly the judgment against the king is *salvo jure regis*, yet it is otherwise in case of life.

But if the judgment be reversd the party may be indicted *de novo*; *quare*, whether in that case upon the reversal upon the point of the verdict the party shall not be executed, for the judge *a que* should have given that judgment, but it seems *in favorem vitæ* he shall be arraigned *de novo*, for possibly he hath other matter for his defense.

If at common law *A.* had committed murder, and had been arraigned within the year upon an indictment, and had been acquitted, tho this arraignment should not have been, yet it stands as a good acquittal

acquittal pleadable to another indictment or appeal: *vide* 8 H. 5. 6. b. Coron. 463. 16 E. 4. 11. a.

A. was indicted for the murder of B. by poisoning, and the indictment runs *quod* B. *fidem adhibens persuasioni dicti* A. *nesciens prædictum potum cum veneno fore intoxicatum recepit & bibit, per quod prædictus* B. *immeditatè post receptionem veneni prædicti obiit*; but it is not alleged, *quod venenum prædictum recepit & bibit*; upon this he was arraigned and acquitted, and had judgment, *quod eat sine die*. Afterwards he was indicted again for the same offense, and pleaded *auterfoits acquit*, and shewed the record in certain, and pleaded over to the felony and murder *not guilty*. [248]

It was resolved, 1. That the indictment was insufficient for this cause. 2. That in this case *auterfoits acquit* was no plea, because the indictment itself was insufficient, for it contained not any matter of felony. 3. And so he is not *legitimo modo acquietatus*, and so the difference is between this case and those above of an erroneous judgment, for here the foundation itself, namely the indictment contained no felony. 4. But if the error be only in the process in an appeal or indictment, and yet the prisoner appear and plead *not guilty* and be acquit, this acquittal is pleadable 19 E. 3. Coron. 444. 5. But if he had been attainted upon this insufficient indictment and judgment given, he should not have been *auterfoits arraigne* upon a new indictment for the same offense, unless the former judgment had been first reversed. 6. But *auterfoits convict* or *auterfoits acquit* by verdict, &c. is no plea, unless judgment be given upon the conviction or acquittal in any case, 4 Co. Rep. 44, 45. *Vauxe's case*.

And the true reason of this judgment is rightly given by my lord Coke, P. C. 214. because the judgment upon the acquittal is only, *quod eat sine die*, which may be upon the defect in the indictment, which the judges are bound to look into, and it shall be supposed, that it was given upon that defect, and not upon the verdict, for the judgment is the same in both, but the judgment upon a conviction is, *quod suspendatur*, which is all the judgment that can be given.

But in the case of the special verdict above, where an erroneous judgment of acquittal is given, yet it is conclusive to the king till the judgment be reversed by error, for the judgment could be only given upon the verdict, the indictment being sufficient, and so is the diversity.

And

And *note* generally, that where *auterfoits acquit* or *attaint* is pleaded, yet in *favorem vitæ* he shall plead over to the felony, and be tried for the same, tho his special plea be found or adjudged against him, *Vauxe's case, ubi supra, &c. 22 E. 39. b.*

[249] III. The third general is where, and in what suits *auterfoits acquit* is a good plea.

If *A.* be appeald of murder of *B.* by *C.* as son and heir of *B.* and is acquitted, and in truth *C.* was not the heir, but *D.* and thereupon *D.* brings an appeal, this *auterfoits acquit* is no plea, because not brought by the right party. 21 *H. 6. 28. b.* neither is it a bar to the king, but he may be indicted notwithstanding that acquittal, or if *D.* be nonsuit in his new appeal, he may be arraigned upon that appeal at the king's suit. 21 *H. 5. 28. b.*

If an appeal of murder or robbery be brought by *A.* against *B.* and *B.* is thereupon acquit by verdict, regularly this is a good bar to an indictment preferred by the king for the same robbery or murder both at common law and at this day.

But an acquittal by battle upon an appeal is held to be no bar to an indictment for the same offense: *vide Stamf. P. C. Lib. II. cap. 36. p. 106. b. (*)*

And at common law, if *A.* had been arraigned upon an indictment for murder or robbery, tho within the year, if an appeal be after brought for the same crime *auterfoits acquit* upon the indictment had been a good bar to the appeal, 16 *E. 4. 11. a.*

And therefore the justices at common law would rarely arraign a prisoner upon an indictment, especially for murder within the year after the death in favour of the appeal. 22 *E. 4. Coron. 44.* unless the appellant had been an infant 32 *H. 6. Coron. 278 & 279.* or the evidence had been very pregnant. 21 *H. 6. 28. b.*

But now by the statute of 3 *H. 7. cap. 1.* in case of murder or manslaughter the justices shall proceed to arraign the prisoner upon an indictment, tho within the year; and if the principal or accessary
[250] be acquitted or attainted within the year and day, yet this shall be no bar to an appeal against them, as if there had

(*) The reason assigned for this by *Stamford* is, because trial by battle does not lie against the king, wherefore he shall not be bound by such trial, yet *Stamford* makes a *quære* of this, for *Bract. Lib. III. cap. 19. §. 8.* is express to the contrary, and

says, that if he be acquit by battle, he shall go quit not only against the appellants, but also from the suit of the king, *quia per hoc purgat innocentiam suam versus omnes, ac si se poneret super patriam, & patria omnino ipsum acquittaverit.*

been no such acquittal, and therefore tho upon the indictment the offenders be acquit within the year, the court ought not to discharge them, but at discretion to bail or commit them, till the year and day be past, *vide le statute.*

So that by this statute *auterfoits acquit* or *attaint* upon an indictment of murder or manslaughter is no bar of an appeal for the same death, tho on the other side *auterfoits acquit* or *attaint* upon an appeal stands still a good bar to an indictment for the same murder or manslaughter. *Stamf. P. C. ubi supra. 4 Co. Rep. 40. a. Darley's case.*

But *auterfoits convict* of murder or manslaughter, and had his clergy upon an indictment is a good bar to an appeal notwithstanding this statute, for indeed the statute itself hath this exception, *the benefit of clergy not being had, 4 Co. Rep. 45. b. Wigg's case*, and this, tho an appeal were depending, whereunto the prisoner had not pleaded at the time of his acquittal. *4 Co. Rep. 45. b. Holcroft's case.*

But the case of other appeals, as of robbery, rape, &c. are not within this statute, and therefore *auterfoits acquit* upon an indictment within the year stands as at common law a good bar to an appeal of robbery, or any other offense other than murder or manslaughter.

And yet at this day the judges never forbear to proceed upon an indictment of robbery, rape, or other offense, altho within the year, and the reason is, because appeals of robbery especially are very rare, and of little use since the statute of 21 H. 8. cap. 11. gives restitution to the prosecutor upon an indictment, as effectually as upon an appeal.

Index to 2 Hawk. P. C. Tit. Bar.

C H A P. XXXII.

[251]

Concerning the plea of auterfoits attaint or convict of the same felony, or any other offense.

IF *A.* be indicted and convict of felony, but hath neither judgment of death, nor hath prayed his clergy, this is no bar of a new indictment for the same offense, if the first were insufficient. *4 Co. Rep. 45. a. Vauxe's case*, and it seems, tho it were sufficient, yet it is no bar without clergy or judgment; but if he had his clergy allowd him,

auterfoits convict and had his clergy is a good bar to an indictment, or an appeal for the same crime, and so remains at this day, notwithstanding the statute of 3 H. 7. cap. 1. 4 Co. Rep. 40. a. 45. b. *Wigg's case*.

And so it is tho he prays his clergy, and the court will advise upon it, tho the clergy be not actually allowd. (*) 4 Co. Rep. 46. a. *Holcroft's case*. Co. P. C. cap. 57.

Auterfoits attaind de mesme felonie, tho upon an insufficient indictment, was at common law a bar to appeals, as well as indictments of the same offense. 4 Co. Rep. 45. a. *Vauxe's case*, and remains so still at this day in all cases but in appeals of death, which is alterd by the statute of 3 H. 7. cap. 1.

If *A.* be attaind of felony by outlawry, yet, if he reverse the outlawry, he shall be put to answer the same felony, and plead to the indictment, whereof he was outlawd; but if he reverse the outlawry for this error, because he was *auterfoits acquit* for the same felony, (which, as before is said, is assignable for error,) he shall be discharged of the indictment, for it stands as well a plea to the indictment, as an error in the outlawry.

[252] If *A.* be indicted of piracy and refusing to plead hath judgment of *peine forte & dure*, and by the general pardon piracies are excepted, but the judgment of *peine forte & dure* is pardoned by the general words of all contempts, *quare*, whether he may be arraigned for the same piracy, but by the better opinion he may be arraigned of any other piracy committed before that award, 14 Eliz. Dy. 308. a.

If *A.* be attaind of treason or felony by outlawry, yet he shall not be *de novo* indicted or appeald for the same felony till the outlawry be reversed, for *auterfoits attaind* of the same felony is a good plea. Co. P. C. 213.

Auterfoits attaind de murder is a good plea to an indictment of petit treason.

If *A.* had been indicted at common law of felony, and had judgment of death, yet he may notwithstanding his attainder be arraigned for treason committed before the felony for the advantage of the king, who is to have the escheat, but not for a treason committed after the felony. 1 H. 6. 5. b. *Stamf. P. C. Lib. II. cap. 37. fol. 107. b.* But

(*) See the case of *Armstrong and Lisle*, *Kel.* 103, 104.

in this my lord *Coke* differs from *Stamford*, and saith that for a treason committed *after* he shall be arraigned. *Co. P. C. p. 213. (a)*

If *A.* commit divers robberies, one upon *B.* another afterwards upon *C.* and afterwards another upon *D.* and they bring several appeals, and he be attaint at the suit of *B.* yet he shall be put to answer to the appeals of *C.* and *D.* for the benefit of the restitution of their goods. *Stamf. ubi supra.*

And if there be an indictment and attainder at the prosecution of *B.* yet *quære*, whether after at the prosecution of *C.* he may not be put to answer an indictment at his prosecution to have benefit of restitution upon the statute of 21 *H. 8. cap. 11. Stamf. Lib. 3. cap. 10.*

It seems in that case there may be an inquest of office to inquire of the robbery of *C.* so as to intitle him to restitution without arraigning the party upon an indictment of *C.*

If *A.* commit several felonies and be attaint for one of those felonies, and the king pardon that attainder and the felony, [253] for which he was attaint, if he be after indicted or appeal'd for the same felony, he may plead his attainder, and it will be no good replication to say he was pardoned after.

But yet he may be indicted or appeal'd for the other felonies, and if he plead his former attainder, it is a good replication to say he was pardoned after, whereby he is now restored to be a person able to answer to those offenses. 6 *H. 4. 6. b. 10 H. 4. Coron. 227. vide contra Co. P. C. p. 213.*

And so if a person attaint commit a felony after, and be pardoned the first felony and attainder, yet he shall be put to answer the new felony. 6 *H. 4. 6. b.*

If *A.* commit several felonies and be convict for one of them, but no judgment of death nor clergy given him, he may be indicted for all those former felonies. *Stamf. ubi supra.*

But if he had been convict for any one felony and prayed his clergy, and read and been deliver'd to the ordinary, he should never be arraigned for any of those former felonies. And it seems by the better opinion, that if he had prayed his clergy, & *tradito ei libro legit ut clericus*, but no award of *traditur ordinario*, yet he should not be arraigned for any felony committed before his clergy allow'd, for it was

(a) The case in 1 *H. 6. 5. b.* was of a treason subsequent to the felony, and therefore rather makes against *Stamford* in favour of lord *Coke's* opinion.

the fault of the court, that they did not award *tradatur ordinarius*.
4 *Eliz. Dy.* 211. *b. Co. P. C. cap.* 57.

And the reason is, because the statute of 25 *E. 3. cap. 5. pro clero* enacts, that he shall be arraigned of all his offenses together, and then deliverd to the ordinary, and therefore if once deliverd to the ordinary, all his capital offenses committed before are in effect discharged, and therefore at least before the prisoner departs from the bar after his clergy allowd, he must be indicted, or otherwise he is for ever discharged.

But for any felony committed after conviction and clergy allowd, he may be indicted and arraigned, but not if he stands attainted and unpardoned.

[254] But at this day that old law concerning the discharge of offenses by clergy allowd is alterd.

By the statute of 8 *Eliz. cap. 4.* it is enacted, “ That if any person admitted to his clergy shall before such his admission have
“ committed any offense, whereupon clergy is not allowable by the
“ laws and statutes of this realm, and not being thereof indicted and
“ acquitted, convicted or attainted, or pardoned shall and may be in
“ dicted or appeald for the same, and put to answer, as if no such
“ admission to clergy had been.

And by the statute of 18 *Eliz. cap. 7.* delivery to the ordinary is taken away, and burning in the hand wholly substituted in lieu thereof, and that every person admitted to his clergy shall answer such felonies or offenses, as he should have done, if he had been deliverd to the ordinary and made his purgation.

So that now clergy doth discharge all offenses precedent within clergy, but not such other offenses, as are out of the benefit of clergy.

There remains one special kind of *autrefois acquit* of another person, than he that pleads it, which I shall mention and so conclude this chapter.

The accessory upon his arraignment may plead the acquittal of the principal.

A gaoler arraigned for the voluntary escape of a prisoner for felony may plead the acquittal of the felon of the principal felony, and so may the rescuer arraigned upon an indictment for rescue of a felon, and that is the reason, that the gaoler and rescuer shall never be arraigned till the principal felon be tried and convicted, because if he be acquitted, the gaoler or rescuer cannot be guilty of felony.

If

If *A.* steal the goods of *B.* and break prison, *A.* may be arraigned of the felony of breaking prison before the arraignment upon the principal felony, but if *A.* be arraigned upon the principal felony and acquitted before conviction of the felony for breaking the prison, *A.* may plead this acquittal, for hereby that felony is purged before his conviction, this was Mrs. *Samford's* case in *Kent* for stealing the goods of the earl of *Leicester*. (*) [255]

To conclude this whole matter of *auterfoits acquit*, *convict* or *attaint* these things are to be observed. 1. The party that pleads the record must plead it specially setting forth the record. 2. He must either shew the record *sub pede sigilli*, or have the record removed into the court, where it is pleaded by *certiorari*, or if it be a record of the same court must vouch the term, year and roll, for the record is part of his plea. 3. He must make averments, as the case shall require, as that he is the same person, that it is the same offense. 4. No issue shall be taken upon the plea of *nul tiel record*, because it is pleaded in court, but the king's attorney may have *oyer* of the record. 5. The averments are issuable. 6. If issue be taken upon them they shall be tried by the jury, that is returned to try the prisoner by the statute of 22 *H. 8. cap. 14.* 7. He, that pleads these pleas, must also plead over *not guilty* to the felony, for if the pleas be adjudged against him, yet he shall be tried upon the *not guilty*.

See Index to 2 Hawk. P. C. Tit. Bar.

(*) *Vide supra, Part I. p. 612.*

CHAP. XXXIII.

Concerning pleas to the felony, viz. Not guilty.

REGULARLY, where a man pleads any plea to an indictment or appeal of felony that doth not confess the felony, he shall yet plead over to the felony *in favorem vitæ*, and that pleading over to the felony is neither a waving of his special plea, nor makes his plea insufficient for doubleness. 22 *E. 4. 39. b.*

And therefore, if he pleads any matter of fact to the writ or indictment, or pleads *auterfoits convict*, or *auterfoits acquit* he shall [256] plead

plead over to the felony; and altho he doth it not upon his plea, but his plea be found or tried against him, yet he shall not be thereby convict without pleading to the felony and trial thereupon. 22 E. 4. 39. b.

But if a man plead to the jurisdiction of the court, as if an indictment of rape be found before the sheriff in his *Turn* and deliverd to the justices, because the sheriff hath no jurisdiction to take an indictment of rape, the prisoner may plead to it without answering to the felony, thus it was done, 22 E. 4. 22. b. which was one *Wheeler's* case; so if the justices of the peace should arraign one for treason.

Or if a man plead a plea, that confesseth the fact, as a release in an appeal, he shall not plead over to the felony. 22 E. 4. 39. b. 9 H. 4. 1. b.

But yet even in that case it seems to me, that he may, if he please, plead over to the felony *not guilty*, and accordingly it is held by *Markham*, 7 E. 4. 15. a. in case of a release.

If *A.* be indicted of felony and plead the king's pardon, for instance, if the indictment be of murder, and the party plead a pardon of felonies, or the like, he shall not need to plead over to the felony, because it suits not with his plea.

And yet, if the pardon upon a demurrer of the king's attorney, or upon advisement of the court be adjudged insufficient, the party shall not be thereupon convict, but shall be put to plead to the felony and be tried for it, and yet the pleading of the pardon is a kind of confession of the fact, but yet *in favorem vitæ* the party shall be put to answer the felony (*); and thus it was done in the case of *Rutaby*, (†) who was indicted for murder in *Durham*, and the indictment removed by *certiorari* into the king's bench, and there he pleaded the king's pardon of murder, which for some defects were adjudged insufficient to pardon him.

He was thereupon remanded, and the indictment remitted, and tried for the fact in *Durham*, and, as I have heard, acquitted. *Hill* 1653.

[257] And regularly in all cases of felony or treason, where a man pleads a special matter, tho he conclude his plea with *not guilty* to the felony, or doth not conclude it so, yet if his plea be tried or found, or ruled against him, he shall be put to his plea of *not*

(*) *Vide supra*, p. 239.

(†) *Vide supra*, Part I. p. 467, Part II. p. 213.

guilty and be tried for the felony, for tho a man shall lose his land in some cases for mispleading, yet he shall not lose his life for mispleading. *Stamf. P. C. Lib. II. cap. 34. fol. 98. b.*

And therefore the book of 14 E. 4. 7. a. that saith, if the appelee demurs, and it be judged against him, it is peremptory, and he shall be executed, must be understood *cum grano salis*; and therefore *Brook* in abridging it, *B. Peremptory* 86. makes doubt of it.

But the true difference seems to be this, if a person be indicted or appeald of felony and he will demur to the appeal or indictment and it be judged against him, he shall have judgment to be hanged, for it is a confession of the indictment, and indeed a wilful confession, for he may have all the advantages of exception to the insufficiency of the indictment or appeal by way of exception either before his plea of *not guilty*, or after his conviction and before judgment, as he might have by demurrer, and in case of his demurrer no judgment of *peine fort & dure* can be given, because the demurrer is a plea, and thus the book of 14 E. 4. 7. a. and 7 E. 4. 29. a. are to be understood, and accordingly 2 Co. *Instit.* 178. *super stat. Westm. 1. cap. 12.*

But if the prisoner pleads in bar, and concludes, as he ought to the felony, or plead a pardon, where he concludes not to the felony, and the attorney general demur, and he join in demurrer, and it be adjudged against the prisoner, yet he shall be put to answer the felony, for this demurrer is no confessing of the indictment, and it is all one, as if his plea were found against him by the jury, or by certificate of the bishop, which yet is not so peremptory (a) but he shall be after tried for the felony. *Stamf. P. C. Lib. II. cap. 34. fol. 98. b.*

If A. be indicted of murder and he hath the king's pardon of manslaughter, if he be arraigned upon the indictment for murder, he must not plead generally *not guilty*, for then he waves his pardon, but he must confess the indictment as to manslaughter and plead thereunto the king's pardon, and as to the murder, *viz. interfection' ex malitiâ præcogitatâ* he is to plead *not guilty*, and if he be found guilty of murder, he shall have judgment, if acquit of the murder, then his plea shall be allowd, and thus I directed it in Sir *Thomas Pettus's* case in *Norfolk* about 24 Car. 2. and it is pursuant to the direction of the statute of 13 R. 2. cap. 1. which requires, that before the pardon allowd it shall be inquired by the country,

(a) See 14 E. 4. 7. a.

whether the party were slain of malice prepense, and if so, the pardon to be disallowd.

Now the plea to the felony consists of two parts, *viz.* 1. The issue of *not guilty*. whereunto the clerk joins issue *cul. prist.* 2. The putting himself upon the country, when the clerk demands how he will be tried.

If either of these fail, it is in law a standing mute, whereupon in case of felony he is put to his penance, and in case of treason he hath judgment, as upon a *nihil dicit*, and so is attainted. 14 E. 4. 7. a.

In case of an indictment of felony or treason there can be no justification made, as a man cannot plead, that what he did was *se defendendo*, or in his defense against a burglar or robber, tho it amount in truth to no felony.

And the reason is, because the indictment supposeth in treason, that the fact was done *proditoriè & contra ligeantiæ suæ debitum*, and in felony, that the fact was done *felonicè*, which is the point of the indictment, and must be answered directly, but upon *not guilty* pleaded he shall have the advantage of all such defenses, as he can make to acquit himself of the felony or treason, and may give all his special defense in evidence, tho the matter of fact be proved upon him, and so it is the most advantageous plea for the prisoner.

If duress and compulsion from others will excuse him or his own necessary defense in safe-guard of his life, or any other matter, the [259] jury upon the general issue ought to take notice of it, and to find their verdict accordingly, as effectually, as if it were or could be specially pleaded.

And now we have brought the prisoner to his trial, wherein we shall now proceed. And these trials of prisoners are of two kinds, *viz.* by battle, or by the jury.

The former doth not concern indictments, for therein there is no trial by battle, but concerns only appeals and approvers, and I shall therefore defer the discussion of trials by battle, till I come to consider of appeals in the end of this book, and proceed to the business of trial by jury.

C H A P. XXXIV.

Touching the trial of offenders by jury, and first, the process.

AFTER the prisoner hath pleaded and put himself upon the country, the next thing in order of proceeding is the trial of the offender.

And therein these things will be necessary to be considered. 1. The process, that brings in the jury to try the prisoner. 2. The return to be made of them, and of what nature and quality they ought to be. 3. What is to be done, if they appear not, or be challenged off. 4. Concerning the challenge of the king, or of the prisoner unto them, if they do appear. 5. The trial and allowance, or disallowance of the challenge. 6. The order of the swearing of the jury. 7. The evidence to be given to the jury, what, and how, and in what manner. 8. The demeanor of the jury before and at the time of the delivering of the verdict. 9. The verdict itself, how to be given and ordered by the jury and by the court. 10. What is to be done in case of miscarriage of the jury either in their verdict, or the circumstances that attend it. [260]

I. And first therefore I will consider what, and how process is to issue to bring in the jury.

And this will be various according to those courts or judicatories, wherein the prisoner is to be tried, *viz.* 1. In the king's bench. 2. Before commissioners of *oyer and terminer*. 3. Before justices of gaol-delivery. 4. Before justices of peace, for these are the usual tribunals, where matters of this nature are determined.

1. Therefore, as to the king's bench.

If the offence be committed in the county, where the king's bench sits, and the indictment be originally taken in the king's bench, and the prisoner arraigned there, the court may proceed *de die in diem* in the term-time, and there needs not fifteen days between the *teste* and return of the *venire fac'* to bring in the jury. 9 *Co. Rep.* 118. *b.* lord *Sanchar's* case.

And the same law is, if the offense be committed in the same county where the king's bench sits, and the indictment be taken before justices

justices of peace of the same county, and removed into the king's bench by *certiorari*, and the prisoner be there arraigned and plead.

But if the offence be committed, and the indictment taken in another county than where the king's bench sits, and it be removed into the king's bench by *certiorari*, and the prisoner be there arraigned and pleads, there must be fifteen days between the *teste* and return of the *venire fac'* or other process. Lord *Sanchar's* case. 9 *Co. Rep. ubi supra*.

The *venire fac'* as all other process of that court, issues in the king's name under the seal of the court and *teste* of the chief justice, and always ought to bear *teste* after the issue joined between the king and the prisoner.

2. As to the commission of *oyer* and *terminer*. Tho there goes out a general precept in the name of three or more of the commissioners, and under their seals fifteen days before their session directed to the sheriff to return twenty-four jurors to try the issue between the king [261] and the prisoners to be arraigned, yet this is but preparatory, and to have a jury in readiness; for after the prisoners are arraigned and pleaded to the country a precept ought to issue to the sheriff in nature of a *venire facias*, which may bear *teste* the same day, that the prisoners plead, commanding the sheriff to return twenty-four, &c. to try the issue upon such a day, and this precept must be in the names and under the seals of the commissioners or three of them, whereof one of the *quorum*, 4 *Co. Instit. cap. 28. p. 164.* and not barely by an award upon the roll.

Or they may make their precept returnable the same day that the prisoner pleads, *viz. ad horam primam post meridiem, &c.* for justices of *oyer* and *terminer* may take their indictment, and arraign the prisoner and try him the same day, against the opinion of 22 *E. 4. Coron. 44.* as appears by the precedents cited 4 *Co. Instit. ubi supra*, and by common experience.

If they make their precept returnable any day after, as for instance the second day of the sessions, they must not only make an adjournment, but record the adjournment, or else it will be intended returnable after their sessions, for the sessions is intended only the first day and no longer, unless an adjournment be entred.

3. Justices of gaol-delivery, after the prisoner hath pleaded, may take his pannel from the sheriff without making any precept to him, 4 *H. 5. Enquest 65. 4 Co. Instit. cap. 30. p. 168.* the reason given is, because justices of gaol-delivery send out a general commandment to the

the sheriff before their session to return juries against they come, otherwise it is, where they have a special commission *per Hankf.*

But this is not the reason, for so it is done by justices of *oyer and terminer* and justices of peace, and yet they make special precepts of *venire fac'* *vide antea, cap. 4.*

4. Justices of peace, as to the point of their precepts of *venire fac'* agree with justices of *oyer and terminer*, for they are as to this purpose commissioners of *oyer and terminer*, and may indict, arraign and try the same day in cases of felony, as it is agreed 4 *Co. Inst. p.* [262] 164. and usual practice.

Now there be certain general observations touching the process against the jury.

1. In all cases, where the process is by writ or precept, as well the award, as the writ or precept ought to mention truly the *visne*, from whence the jury shall come, and where it is only by award without writ or precept, as in case of the justices of gaol-delivery, the award ought to mention the *visne*, from whence the jury shall come.

As if a murder be supposed to be at *D.* the *venire fac'* ought to return a jury *de vicineto de D.*

If the murder be alledged *apud civitatem Bristol*, the *venire fac'* is most properly *de Bristol*, and it is good, because a city, 7 *H. 4. 13. a. Enquest 36.* but if it be from a place not a city, it must be *de vicineto de D.*

But tho it be a city, yet the *venire fac' de vicineto civitatis Bristol* is good, tho it be also a county, as hath been often resolved against the opinion of *Stamford, Lib. III. cap. 4. fol. 154. b.*

If the stroke be laid at *B.* and the death at *C.* in the same county, the *venire fac'* must be *de vicineto B. & C.* because both make the felony.

But by the statute (*a*), where the stroke is in one county, and the death in another, the indictment shall be, where the death was, and the *visne* shall be from the place, where he is alledged to die, for necessity, because the process is not to go into the other county.

If a murder be laid *in quadam platea vocat' Kings-street in parochia Sanctæ Margaritæ apud civitatem Westm.* the *visne* shall be neither from *Kings-street*, because it is alledged to be only *platea* nor *de vicineto civitatis Westm.* but *de vicineto parochiæ Sanctæ Margaritæ*, because more certain. 6 *Co. Rep. 14. a. Arundel's case.*

(a) 2 & 3 *E. 6. cap. 24.*

But if a murder be laid *apud B. in parochiâ de C.* the *venire fac'* shall be *de vicineto de B.* because more certain, for it shall be intended
 [263] a vill or hamlet within a parish, and by common intendment a parish may contain many vills. 11 *Co. Rep.* 25. *b.* *Harper's case.*

But at this day by the statute of 22 *H. 8. cap. 2.* made perpetual by 32 *H. 8. cap. 3.* if a foreign plea be pleaded in case of an indictment of felony, it shall be tried by the jury, that should try the issue of *not guilty*, but in case of an indictment of treason, as I have before said, that statute takes not place, but it shall be tried by a jury of that place or county, where the foreign matter pleadeth ariseth.

2. As to the number of the jury the *venire fac'* or precept is only *venire fac'* twelve, but the sheriff ought to return twenty-four.

But the general precept, that issues before a sessions of gaol-delivery, *oyer and terminer*, and of the peace before mentioned is to return twenty-four, and commonly the sheriff returns upon that precept forty-eight.

But the award or precept to try the prisoner after he hath pleaded is only *venire fac'* twelve, and twenty-four are returned by the sheriff upon that pannel.

3. Touching the manner of the precept, writ, or award.

If *A. B. C.* and *D.* be indicted for one felony or murder before any justices, they may issue one *venire fac'* or may issue several *venire fac'* or precepts, or awards of that kind.

If the *venire fac'* be joint, then if *A.* challenge twenty peremptorily, or challenge for cause, the jurors challenged shall be drawn against all, for each may have his several challenge, and the like, if it were in an appeal; so that, if there were eighty upon the pannel, they may be all challenged off by their several peremptory challenges, which is a great inconvenience, and therefore in such case they antiently used to sever the prisoners, and so put them to challenge apart, whereby they may possibly hit upon the same persons. 9 *E. 4.* 27. *b.* 21 *H. 6.* 22. *a.* 22 *H. 6.* 4. *a.* therefore the best way is to make out several *venire fac'* and consequently, if the pannel be challenged off, yet forty *tales* may be granted upon each *venire fac'*.

And if the *venire fac'* in an appeal be once granted jointly, it cannot
 [264] be afterwards severed, neither can there be several *tales*, for if the *venire fac'* be joint, the *tales* must be joint. 27 *H. 6.* 5 & 6.

And

And it seems, that in case of an indictment, tho it be the king's suit, if once a *venire fac'* issue joint, there cannot issue a several *venire fac'* nor a several *tales*, which in many cases may much delay, if not frustrate the trial.

But before justices of gaol-delivery, where there is no precept but only an award, tho at first the award be joint, and the pannel accordingly returned by the sheriff, and the prisoners challenge peremptorily severally, whereby there are not enough left upon the pannel to try them, and a *tales* is awarded returnable the next day, yet the court may sever the first award and also the *tales*. *Plow. Com.* 100. *a. b.* *Salisbury's case* adjudged.

It is therefore considerable, whether the difference between the cases of the old books and this be, that those were of an appeal, which is the party's suit, and this of an indictment, which is the king's suit, or rather, (as I think,) because this was in case of justices of gaol-delivery, where there is neither writ nor precept, but a command *ore tenus*, and when the record is made up, then an award upon the roll, which the justices may model, as they please, at any time before the trial, and requires not such strict formality as a writ. 4 *H.* 5. *Enquest* 55.

II. The second general is touching the return of the sheriff upon the precept, and the quality of the jurors.

Upon the writ or precept, or command to the sheriff he ought to make the return, whether the place or *visne* be within a franchise or not, and cannot return a *mandavi ballivo*, as in some cases of appeals, for here the writ is for the king, and therefore with a *non omittas propter aliquam libertatem*.

The writ commands him to return *duodecim liberos & legales homines de vicineto*; they must be, 1. Freemen and regularly freeholders. 2. *Legales*, without any just exception. And 3. They are to be *de vicineto*, but this is not necessarily required, for they of one side of the county are by law *de vicineto* to try an offense of the other side of the county.

But concerning the quality of the jurors more shall be said, [265] when we come to consider of challenges.

The jurors returned by the sheriff were, at common law, those, that were to try the prisoners, but by the statute of 3 *H.* 8. *cap.* 12. all pannels returned by sheriffs or their ministers, (which be not between party and party,) before any justices of gaol delivery, or of the peace,

peace, whereof one of the *quorum*, shall be reformed by putting to, and taking out the names of the persons impannelled, by discretion of the justices, before whom such pannel shall be returned, and the pannels so reformed shall be good and lawful, and the sheriff shall return the pannel so reformed upon pain of 20*l*.

This statute, which began to be set on foot 11 *H. 7. cap. 24.* hath much reformed many practices of sheriffs in packing of juries in cases capital.

Note, tho the preamble of this statute mentions inquests of inquiry, the body of the act seems to extend to all pannels, as well of the petit jury, as of the grand inquest, and so it hath been constantly practised, for if a prisoner be arraigned before the judge that sits upon the crown-side, it hath been always usual for the judge to send for a jury to the judge of *nisi prius*, and when the jury is brought, the sheriff returns them between the king and the prisoner, which is by virtue of this statute.

Where the jury must be *de medietate linguæ*, and other matters relating to the quality of the jurors will be considered, when we come to consider of challenges.

III. The third general is to consider what is to be done, if the jury appear not, or be so challenged off, that there are not enough upon the pannel to try the prisoner.

If the process be in the king's bench, and the jury fill not, or be challenged off, that there are not enough to try the prisoner, there ought to issue a *distingas juratores*, and a command to return *tales*.

But if the whole jury be challenged off, then a new *venire facias*, and if none of the jury appear, then a *distingas juratores* shall issue, and no *tales*.

[266] But if some of the jury appear, but not a full jury, or if so many of them, that appear, are challenged off, that there remains not a full jury, a *distingas* shall issue with a *tales*.

If a full jury appear, and before they are sworn one of them die, so that there remains not a full jury, a *tales* shall be granted, and so it is, if one jurymen dies after he be returned and sworn. 12 *H. 4. 10. a.* 20 *E. 4. 11. b.*

If a *tale* issue, and they do not appear full, or be challenged off, so that those that appear upon the principal pannel and *tales* make not up a full jury, another *tales* may be granted. 14 *H. 7. 1. b.*

In

In case of felony a *tales* may be granted of a greater number than the principal pannel in respect of challenges, so that there may be forty *tales* or more. 14 *H.* 7. 7. but if several succeeding *tales* be granted, the latter must be less in number than *that* which was next before, unless the array of the preceding *tales* be quashed, and then the number of the next may equal it. 20 *H.* 6. 40. *a.*

The times between the *teste* and return of the *tales* must be (as it seems,) as in the principal *venire fac'*, *viz.* if the indictment be in a foreign county and removed into the king's bench, fifteen days, if in the same county, *de die in diem*.

If the indictment be before justices of *oyer and terminer*, the *tales*, as well as the principal pannel, ought to be by precept in the names of three of the justices, and may be made returnable *de die in diem*, or *de hora in horam* of the same day.

And as to all other matters they resemble the proceedings in the king's bench, *viz.* the number, the manner, and times of granting it, and so need not be repeated.

Before justices of gaol-delivery this learning of *tales* is not of much use, because there is no particular precept to the sheriff to return either jury or *tales*, but the general precept before the sessions and the award, or command of the court upon the plea of the prisoner. 4 *H.* 5. *Enquest* 55. *Stamf. P. C. Lib. III. cap. 6. fol. 155. b.*

And yet, *vide Plow. Com.* 100. *a.* in Salisbury's case before justices of peace and gaol-delivery, a *tales* granted returnable the next day. [267]

See 4 Blacks. Com. ch. 27. of Trial, &c. Index to 2 Hawk. P. C. Tit, Trial. See 2. Hawk. P. Coron. ch. XL. XLI. XLII.

CHAP. XXXV.

Concerning challenges, and first, of peremptory challenges.

CHALLENGES in respect of the parties taking them are of two kinds. 1. Challenges by the prisoner. 2. Challenges by the king.

Challenges by the prisoner are of two kinds. 1. Without cause shewn, which are commonly called peremptory challenges. 2. With cause

cause shewn, which again are of two sorts. 1. Of the array. 2. To the poll.

In this chapter I shall consider peremptory challenges what they are, and what is to be done upon them.

By the common law, if a man were outlawed of felony or treason, and brought a writ of error upon the outlawry, and assigned some error in fact, whereupon issue was joined, he should not challenge peremptorily or without cause. *Stamf. P. C. Lib. II. cap. 7. fol. 158. a.*

The like law seems to be, if he had pleaded any foreign plea in bar or in abatement, which went not to the trial of the felony, but of some collateral matter only.

But if a man be indicted or appealed of treason or felony, and plead *not guilty*, or plead any other matter of fact triable by the same jury, and plead over to the felony, because his life is now at stake he might challenge peremptorily and without cause any jurors under the number [268] of three whole juries, namely thirty-five of the jurors returned, and they are to be withdrawn out of the pannel; and this was *in favorem vitæ*, *Moore* 12.

And if twenty men were indicted for the same offense, tho by one indictment, yet every prisoner should be allowed his peremptory challenge of thirty-five persons. 9 *E. 4.* 27. *b.*

And if there were but one *venire fac'* awarded to try them, the persons challenged by any one should be withdrawn against them all. 9 *E. 4.* 27. *Plow. Com.* 100. *Salisbury's case.*

But if he had peremptorily challenged above thirty-five persons, and insisted upon it, and would not leave his challenge, then in case of an indictment of high treason, it amounted to *nihil dicit*, and judgment of death should be given against him.

But in case of petit treason or felony the prisoner was antiently put to *peine fort & dure*, as declining the trial by law appointed, the consequence whereof was only the forfeiture of his goods, but it amounted to no attainder, and consequently no escheat of his lands; *vide* 14 *E. 4.* 7. *a. Plow. Com.* 262. *b.* and thus the practice was until the beginning of *H. 7. vide* 17 *Affiz.* 6. 17 *E. 3.* 23. *a.*

But afterwards by the advice of all the judges of both benches it was resolved, that the party so peremptorily challenging above thirty-five should have judgment of death, and it amounted to an attainder, 3 *H. 7.* 12. *a. Co. P. C.* 227, 228, for having pleaded to the felony, and put himself upon the country here could be no standing mute, and therefore

fore the judges resolved on this course, as most consonant to law, to be practised in all circuits. 3 *H.* 7. 12. *a.*

But for all this the better opinion of latter times, as well as of former is, that the judgment in case of such a peremptory challenge of above thirty-five at the common law before 22 *H.* 8. in case of felony was not an attainder but only penance according to the resolution of the judges in the time of *E.* 4. mentiond by *Hussey* 3 *H.* 7. 12. *a.* *Stamf. P. C. Lib. II. cap. 61. fol. 150. b.* *Stamf. prærogat. 46. a.* *Plow. Com. 262. b. per Weston.*

And in this case the jury it seems was not to be sworn, [269] but the judgment was given singly upon his peremptory challenge.

And yet, if a prisoner plead *not guilty*, and put himself upon the country, and the prisoner challenge peremptorily under three juries, *viz.* thirty-five, whereby the jury remains, and a *tales* is granted, and the jury appears, and the prisoner then stands mute, yet the jury shall pass upon him upon his plea of *not guilty*, which he had before pleaded. 15 *E.* 4. 33. *b.*

But by the statute of 22 *H.* 8. *cap. 14.* it is enacted, "That no person arraigned for petit treason, murder, or felony be admitted to any peremptory challenge above the number of twenty, this act was continued until 32 *H.* 8. *cap. 3.* and then made perpetual.

By the statute of 33 *H.* 8. *cap. 23.* it is enacted, "That in cases of high treason, or misprision of treason, peremptory challenge shall not be allowd.

But notwithstanding these statutes, by the statute of 1 & 2 *P. & M.* *cap. 10.* enacting, "That all trials for any treason shall be according to the due order and course of the common law," peremptory challenge of thirty-five or under, is, at this day, allowable in cases of high treason and petit treason. *Co. P. C. 227.* *Stamf. P. C. Lib. 3. cap. 7. fol. 158. a.*

And consequently all the consequences thereof, namely the attainder of the prisoner, that peremptorily challengeth above thirty-five in an indictment of high treason or petit treason, stand as at common law.

But as to all murders and other felonies the statute of 22 *H.* 8. *cap. 14* taking away the peremptory challenge of above twenty stands in force. *Co. P. C. 227, 228.*

But then suppose the prisoner in case of felony peremptorily challenges above twenty, what shall be done? shall judgment of death be given, as where he challenged above thirty-five at common law? And it should seem, by the opinion of former times, it should.

[270] For the several statutes, that oust clergy in case of challenging above twenty, import, that by such challenge the party should be convicted, otherwise clergy were needless to be ousted upon such challenge, as 25 *H. 8. cap. 3. vide 11 Co. Rep. Poulter's case 30 b. 4 & 5 P. & M. cap. 4.*

But yet, if he challenge above twenty, as the law stands at this day, he shall not have judgment of death, but only his challenge shall be over-ruled, and the jurors sworn for two reasons. 1. Because the statute hath made no provision to attain the felon, if he challenge above the number of twenty. 2. Because the words of the statute of 22 *H. 8.* are, *That he be not admitted to challenge above the number of twenty*, so that, if he challenge above twenty peremptorily, his challenge shall be only disallowd. *Co. P. C. cap. 102. p. 227, 228.*

If *A.* be indicted and plead *not guilty*, the jury appears, he challengeth six of the jury for cause, and the causes found insufficient, and the six are sworn, and the rest of the jury challenged off, whereby the inquest remains *pro defectu juratorum*, a *tales* granted and the jury appear, the prisoner may challenge peremptorily any of the six, that were before challenged for cause, allowd, and sworn 32 *H. 6. 26. b. 14 H. 7. 19. a.* for it is possible a new cause of challenge may intervene after the former swearing. 2 *R. 3. 13. a.* but if a man challenge him for cause, he must shew a cause happened after the former swearing.

But if the prisoner upon the first pannel had challenged for instance fifteen peremptorily, and then the jury remains for default of jurors, and a *distringas* with a forty *tales* is granted, he shall challenge peremptorily no more than will fill up his number, *viz.* in case of felony at this day five more, and in case of treason or petit treason twenty more to make up his full number of twenty peremptory challenges in the first case, and thirty-five in the last.

See 2 Hawk. P. C. ch. XLIII. of challenges. 4 Blackf. Com. ch. 27. pa. 352, &c. &c. Burn. Tit. Jurors, sect. iv. of the challenge of Jurors. Index to Foster. Tit. challenge.

C H A P. XXXVI.

Concerning challenges for cause, in case of indictments for treason or felony.

CHALLENGES for cause upon indictments are of two kinds, either for the king, or for the prisoner, and each of these are again of two kinds, either to the array, or to the poll.

The king may challenge the array or the poll. 4 *H.* 7. 3. *b.* Stat. 33 *E.* 1. *Ordinatio de inquisitionibus*, but then he must shew cause of challenge, but he need not shew the cause upon his challenge to the poll, till the whole pannel be perused. *Stamf. P. C. Lib. III. cap. 7. fol. 162. b.*

Challenges by the prisoner for cause shewn are of two kinds, *viz.* Either to the array or to the poll, but it is no principal challenge either to the array or poll, that the sheriff or juror is of the king's livery, but he must conclude to the favour. 3 *H.* 6. *Challenge* 17.

If an alien be indicted or appealed of felony, tho the indictment ought to be by a grand inquest of *English*, yet by the statute of 28 *E.* 3. *cap. 13.* the trial shall be *per medietatem linguæ*, *viz.* half the jury to be of aliens, except in case of felony by *Egyptians*, within the statute of 1 & 2 *P. & M. cap. 4.*

And this statute extends to felonies, as well made after the statute of 28 *E.* 3. as before, for the statute is general *all manner of inquests.*

And this statute extended to trial of aliens indicted of treason also, and so the law stood till 1 & 2 *P. & M. cap. 10.* which restored the common-law trial in treason, and consequently ousted *medietas linguæ.* 1 *Mar. Dy.* 145. *a.* *Shirley's case. Co. P. C. p. 27.*

If upon an indictment of felony against an alien he plead *not guilty*, and a common jury be returned, if he doth not [272] surmise his being an alien before any of the jury sworn, he hath lost that advantage, *Dy.* 304. *a.* but if he alledge, that he is an alien, he may challenge the array for that cause, and thereupon a new precept or *venire facias* shall issue, or an award be made of a jury *de medietate linguæ.* 21 *H.* 7. 32. *b.* but it is more proper for him to surmise it upon his plea pleaded, and thereupon to pray it.

It seems, that upon indictments of treason or felonies, the prisoner pleading *not guilty* there ought at common law to be four hundreders returned: *vide Stat. 33 H. 8. cap. 23.* that ousted challenge for shire or hundred in cases of treason, but that statute as to treason was altered by 1 & 2 P. & M. cap. 10.

But the statute of 35 H. 8. cap. 6. requiring six hundreders, and that of 27 Eliz. cap. 6. requiring only two hundreders in personal actions extend not to trials upon indictments of treason or felony.

Yet I never knew any challenge for default of hundreders upon a trial of an indictment for felony or treason.

Challenges to the poll for cause are many, as in other cases, which I shall not mention at large, because they are all gathered up by my lord Coke *super Lit.* §. 234. but shall only mention such, as more specially belong to capital causes.

By the statute of 33 H. 8. cap. 12. for treason or felony committed in the king's house and tried before the lord steward all challenge except for malice is taken away. By the statute of 25 E. 3. cap. 3. it is enacted, "That no indicter be put in inquest against the party
" indicted, if he be challenged for that cause.

By the statute of 2 H. 5. cap. 3. no man is to be admitted in any inquest upon the trial of the death of a man (a), unless he have
lands

(a) That is to say in capital causes: This statute was introductive of a new law only with respect to the *quantum* of the freehold, for by the *common law* it was requisite that a juror should be a freeholder, so that, tho this statute be repealed by the general words of 1 & 2 P. & M. cap. 10. as to treason, yet some freehold was still necessary, and so it was allowed in *Fitzharris's case* by *Pemberton C. J.* See *Stat. Tr. Vol. III. p. 263.* notwithstanding it was ruled otherwise in the case of lord *Ruffel* by the same judge, *Stat. Tr. Vol. III. p. 634.* and in the case of Col. *Sydney.* *Ibid. p. 736.* which last resolutions were declared to be illegal by several acts of parliament. See 1 W. & M. *Seff. 2. cap. 2. 7 W. 3. cap. 3.* See also Sir *John Hawles's* remarks on those trials. *Stat. Tr. Vol. IV. p. 169, & p. 189.* By 4 & 5 W. & M. cap. 24. continued by 10 Ann. cap. 14. & 9 Geo. 1. cap. 8. 'tis not sufficient, that a juror be a freeholder, but he must also have within the same county freehold or copyhold lands to the clear yearly value of ten pounds, and tho this statute seems principally to regard counties at large, yet it hath been allowed to extend to trials in

London for high treason. *Francia's case.* *Stat. Tr. Vol. VI. p. 58.* and *Layer's case* *Stat. Tr. Vol. VI. p. 245.* See the statutes of 3 Geo. 2. cap. 25. & 4 Geo. 2. cap. 7. made perpetual by 6 Geo. cap. 37. whereby it is provided, "That all leaseholders
" upon leases for the term of 500 years or
" more, or for 99 years, or any other term
" determinable upon one or more lives of
" an estate in possession in land in their
" own right of the yearly value of twenty
" pounds or upwards over and above the
" reserved rent payable thereout, (or in
" the county of *Middlesex* upon any leases,
" where the improved rents or value amount
" to fifty pounds or upwards *per*
" *manum* over and above all ground rents
" or other reservations) may be summoned
" or impannelled to serve on juries in like
" manner as freeholders, &c. And that
" the sheriffs of *London* shall not impanel
" or return any person to try any issue in
" *King's-bench, Common Pleas, and Exche-*
" *quer,* or to serve on any jury at the
" sessions of *oyer and terminer, gaol-delivery,*
" or sessions of the peace, but such
" who shall be an householder within the
" said city, and have real or personal es-

"tate

lands or tenements of the value of 40*s. per ann.* above all charges, if he be challenged: And by the construction of this statute, 1. It must be land of that value in the same county 9 *H.* 7. 1. *b.* Again 2. He must not only be seised thereof at the time of the pannel made, but also at the time that he comes to be sworn, otherwise he may be challenged. 12 *H.* 7. 4. *a.*

And altho the statute of 27 *Eliz. cap.* 6. hath raised it to 4*l. per annum*, yet that extends only to issues joined in the king's bench, common pleas, exchequer, and justices of assise, so that it reacheth not to trials of felons before justices of gaol-delivery, *oyer* and *terminer*, or of the peace, but these trials stand as they did by the statute of 2 *H.* 5. as to the value of jurors, *vide stat.* 33 *H.* 8. *cap.* 23.

But yet by some subsequent statutes the value of jurors freehold in cases of trial of felony is changed.

By the statute of 8 *H.* 6. *cap. ultimo* upon a trial *per medietatem linguæ* aliens need not have 40*s. per ann.* so defec- [274]
tus annui censûs is no challenge as to the aliens, but still it remains a good challenge as to the other half of the jury, that are denizens. *Stamf. P. C. fol.* 160. *b.*

By the statute of 23 *H.* 8. *cap.* 13. upon trials of felony or murder in cities or boroughs a citizen or burgher worth 40*l.* personal estate may pass, tho he have no freehold, but knights or esquires living there are not within this provision.

The statute of 33 *H.* 6. *cap.* 2. concerning indictments of persons living in *Lancashire* refers not to trials.

By the statute of 11 *H.* 6. *cap.* 1. a challenge is allowd of any person living in the stews of *Southwark*, tho he be of sufficient freehold.

When a prisoner challengeth for cause he ought to shew his cause presently (*b*) because it is the king's suit, 1 *H.* 5. 10. *b.* 38 *Affiz.* 22. (*c*) but some books are, that he shall not shew cause till the pannel be perused 6 *R.* 2. *Challenge* 105. but he must shew all his causes together *per* 24 *Eliz. C. B. Bracket's case.*

If in a trial upon an indictment of felony eleven be sworn, and the twelfth challenged, whereby the inquest remains for default of jurors,

“ tate to the value of one hundred pounds,
“ and that no person shall be impannelled
“ or returned to serve on any jury for the
“ trial of any capital offense, who shall
“ not be qualified to serve as a juror in civil
“ causes; and the same matter and cause
“ alleged by way of challenge and so

“ found shall be admitted as a principal
“ challenge, and the person so challenged
“ may be examined on oath as to the truth
“ of the said matter.
(*b*) *Mo.* 846. *Luke and Clerk.*
(*c*) See *Challenge* 128.

and a *distringas* with a *tales* issue, and the jurors appear, ruled 1. The king shall not challenge any of the eleven sworn, unless it be for a cause happened since their swearing; if it happen before, tho not known till after, it shall not be allowd. 2. That the eleven, that were last sworn, shall not be now first sworn, but they shall be called, as they happen in the pannel. *M. 43 & 44 Eliz. B. R. Wharton's case, Yelv. 23.*

And the same law is for the challenge of the prisoner for cause, but he may challenge them peremptorily notwithstanding they were formerly sworn, as before is shewn, *p. 270.*

Touching the trial of a challenge for cause made to the poll, *vide* [275] *Co. Lit. p. 158. a.* If a juror be challenged before any jury sworn, two triers shall be appointed by the court, and if he be found indifferent and sworn, he and the two triers shall try the next challenge, and if he be tried indifferent, then the two first triers shall be discharged, and the two jurors tried indifferent shall try the rest.

If the plaintiff challenge ten and the prisoner one, then he that remains shall have added to him one chosen by the plaintiff, and another by the prisoner, and they three shall try the challenge. If six be sworn, and the rest challenged the court may assign any two of the six sworn to try the challenges.

If the array be challenged, it lies in the discretion of the court how it shall be tried, sometimes it is done by two attornies, sometimes by the two coroners, and sometimes by two of the jury with this difference, that if the challenge be for kindred in the sheriff, it is most fit to be tried by two of the jurors returned; if the challenge found in favour of partiality, then by any other two assigned thereunto by the court. *29 Eliz. C. B. Lester's case, Trin. 21 Jac. B. R. Loyd and Williams (e).*

But all this learning touching challenges to the poll, whether peremptory or for cause, is intended of trials by ordinary juries, not of trial by peers, for there no challenges is allowable, for they are not only triers of the fact but in some respects judges. *P. 7 Car. 1. Casus comitis Castle-haven (f),* but of this more hereafter.

2 Hawk. P. C. ch. 43. 4 Blackf. Com. ch. 27. Burn. Tit. Jurors. Index to Foster. Tit. Challenge.

(e) 2 Rol. Rep. 363.

(f) State Trs Vol. I. p. 366.

C H A P. XXXVII.

Concerning evidence and witnesses.

HAVING gone through those things, that are previous and preparatory to the trial, I come now to consider the trial itself by jury, and the things concomitant with it, and first concerning the evidence to be given to prove the prisoner guilty.

To give a full account of evidence of this kind there will be these things examinable. 1. The quality and qualifications of witnesses. 2. The manner of their testimony, what upon oath, and what without oath. 3. Those evidences and examinations, that are in writing, what, and when allowable, and what not. 4. The things testified, and therein of presumptions and presumptive evidences by the common law, and by acts of parliament. 5. What variance between the evidence and indictment maintains the indictment.

I. Concerning the quality and competency of witnesses to be produced.

It is to be observed, that there be many circumstances that disable a juror or are sufficient causes of exceptions or challenges of him, that are not allowable exceptions against a witness.

The exception of kindred is a good cause of challenge against a juror, but not against a witness, therefore the father may be a competent witness for or against his son, or *à converso*, the master for his servant or *à converso*. These and the like exceptions may be to the credit or credibility of a witness, but are not exceptions against his competency.

For that I may observe it once for all, the exceptions to a witness are of two kinds. 1. Exceptions to the credit of the witness, which do not at all disable him from being sworn, but yet may blemish the credibility of his testimony, and in such case the witness is to be allowed, but the credit of his testimony is left to the jury, [277] who are judges of the fact, and likewise of the probability or improbability, credibility or incredibility of the witness and his testimony, and these exceptions are of that great variety and multiplicity, that they cannot easily be reduced under rules or instances. 2. Exceptions to the competency of the witness, which do exclude him from giving

his testimony, and of these exceptions the court is the judge, and of these latter kind of exceptions I am here to treat.

If a person be outlawd in a personal action, it is a good cause of challenge against him as a juror, but yet he shall be sworn as a witness notwithstanding his outlawry. *Coke super Lit.* §. 1. fol. 6. b.

The common incapacities or incompetencies of witnesses are reckoned up by my lord *Coke ubi supra*, viz. 1. If he be attaint of giving a false verdict. 2. Or attaint of a conspiracy at the king's suit, for then he is to have a villainous judgment and *amittere liberam legem*, otherwise it is if he be only attaint at the suit of the party: *vide* 24 E. 3. 73. b. 43 E. 3. 33. b. 4 H. 5. Judgment 220. 46 Affiz. 11. 27 Affiz. 59. 3. If he be convict of perjury. 4. Convict of a *præmunire*. 5. Convict of forgery upon the statute of 5 Eliz. cap. 14. but [not] a conviction upon the statute of 1 H. 5. cap. 3. 6. If he be convict of felony (*a*). And therefore it should seem, that an approver shall not be sworn as a witness, if the appellee plead to the country, but only his general oath, that he taketh at the time of his becoming an approver, shall be taken, *quod tamen quære*, for this case differs from the testimony of a person convict, for the approver accuseth himself as well as the appellee. 7. If by judgment he hath lost his ears. 8. Or by judgment stood upon the pillory. 9. Or tumbrel. *Co. P. C.* 219. for they are thereby infamous. 10. Or been branded, *stigmaticus*. 11. Or being a champion in a writ of right becomes recreant or coward, for these render a person infamous, so that he loseth *liberam legem*. [278]

But yet in these exceptions these things are to be observed. 1. That he that allegeth this exception ought to shew forth a copy of the record attested or vouch the roll in court. 2. That if the king pardon these offenders, they are thereby rendered competent witnesses, tho their credit is to be still left to the jury, for the king's pardon takes away *pœnam & culpam in foro humano*, *M. 12 Jac. B. R. Cuddington & Wilkins (b)*: but yet it makes not the man always an honest man, and therefore he shall not be a juryman 11 H. 4. 41. but yet may be a witness against the opinion of my lord *Coke* in *Crashaw's* case, *M. 11 Jac. B. R. Bulstrode* 154. *quod vide*.

If a man be convict of felony, and prays his clergy, and is burnt in the hand, he is now a competent witness, for by the statute of

(*a*) See *Dangerfield's* case in the trial of lord *Castlemain*, *Stat. Tr. Vol. III. p. 42.* *Raym.* 379. and the trial of *Eliz. Cellier*,

Stat. Tr. Vol. III. p. 35. *Raym.* 369. (*b*) *Hob.* 67 & 89.

18 *Eliz. cap. 7.* it countervails a purgation and a pardon, and he is thereby enabled afterwards to acquire goods. *Hob. 238. Searle and Williams.*

And so it is if he be in orders, whereby burning in the hand is discharged by the statute of 4 *H. 7. cap. 13. Hob. ubi supra.*

And so it is if the burning in the hand be pardoned, *Hob. ibid.* or if he prays his clergy, tho the court do respit his reading, *quære, vide Holcroft's case, 4 Co. Rep. 46. a.*

There are certain other matters, that render a man incompetent to be a witness, tho they are not such as render him infamous by judgment or award in any of the king's courts.

1. Some are disabled in regard of defect of intellectuals: A person of *non sane memory* cannot be a witness, while he is under that insanity, but if he have *lucida intervalla*, then during the time he hath understanding he may be a witness. *Co. Lit. ubi supra.* But it is a difficulty scarcely to be cleared, what is the *minimum, quod sic* disables the party.

If an infant be of the age of fourteen years, he is as to this purpose of the age of discretion to be sworn as a witness, but if under that age, yet if it appear that he hath a competent discretion, he may be sworn.

But in many cases an infant of tender years may be examined without oath, where the exigence of the case requires [279] it, as in case of rape, buggery, witchcraft, *de quibus vide quæ supra, Part I. cap. 24. p. 302. & cap. 58. p. 634. & infra, p. 283.*

2. It is said by my lord *Coke ubi supra*, that an infidel is not to be admitted as a witness, the consequence whereof would also be, that a *Jew*, (who only owns the old testament) could not be a witness.

But I take it, that altho the regular oath, as it is allowd by the laws of *England*, is *tañtis sacrosanctis Dei evangelis*, which supposeth a man to be a christian, yet in cases of necessity, as in foreign contracts between merchant and merchant, which are many times transacted by *Jewish* brokers, the testimony of a *Jew tañto libro legis Mosaicæ* is not to be rejected, and is used, as I have been informed, among all nations.

Yea, the oaths of idolatrous infidels have been admitted in the municipal laws of many kingdoms, especially *si juraverit per verum Deum creatorem*, and special laws are instituted in *Spain* touching the form

form of the oaths of infidels. *Vide Covarruviam, Tom. I. part 1. de juramenti forma (c).*

And it were a very hard case, if a murder committed here in *England* in presence only of a *Turk* or a *Jew*, that owns not the christian religion, should be dispunishable, because such an oath should not be taken, which the witness holds binding, and cannot swear otherwise, and possibly might think himself under no obligation, if sworn according to the usual style of the courts of *England*.

But then it must be agreed, that the credit of such a testimony must be left to the jury.

3. Some regularly are disabled in respect of the civil unity of their persons, as the husband regularly is not allowed to be a witness for or against the wife, or *à converso*; but *vide* touching this also at large *Part I. cap. 24. in fine & ibid. cap. 64. p. 693. super statut. 1. Jac. cap. 11.*

4. Some are disabled to be witnesses in respect, that they are concerned in interest.

[280] And therefore a party to an usurious contract, if the money be unpaid, shall not be received as a witness to prove the usury, because he avoids thereby his own security, but otherwise it is, if the money be already paid, and the security taken up, for then he is allowable to be a witness for the king (*d*).

A. wounds *B.* for which he is indicted, yet *B.* may be a witness for the king: but this shall be no evidence in an action brought by *B.* for the assault, tho *A.* be convict at the king's suit.

If a reward be promised to a person for giving his evidence before he gives it, this, if proved, disables his testimony.

And so for my own part I have always thought, that if a person have a promise of a pardon, if he gives evidence against one of his own confederates, this disables his testimony if it be proved upon him (*e*).

Yet in some cases a consequential benefit to the witness doth not disable his testimony, tho it may abate the credit of his testimony.

A. B. and *C.* are severally indicted for perjury in proving a bond, *A.* traverseth the indictment, *B.* and *C.* tho indicted for the same

(c) *P. 249. Edit. Antwerp. 1614.*

(d) *Co. Lit. 6. b.*

(e) However the contrary opinion hath prevailed, see *Tong's case, Kel. 48.* and

Layser's case Stat. Tr. Vol. 6, p. 257. but most certainly it is a great objection to the credibility, if not to the competency of the witness, *vide supra, Part I. p. 304.*

offense, yet not being convicted may be witnesses for *A.* to prove the bond sealed. *P.* 19 *Car* 1. *B. R. Rot.* 2. adjudged in the case of *Billmore, Gray, and Harbin*, and accordingly ruled *P.* 40 *Eliz.* *C. B. Gunston and Downs* (*f*) in three actions severally brought against three persons for perjury in *Chancery* in one and the same point, for the other two are not immediately concerned in this trial, tho consequently they are concerned, the point being the same.

If *A.* bring an action upon the statute of *Winton* against the hundred, none that live or have land in the hundred shall be admitted to give evidence for the hundred. *M.* 1650. *Bennet versus Hundred de Hertford* (*g*).

Yet if a person be taken and indicted for the robbery, they of the hundred may be admitted to prove the defendant guilty of the robbery, and that he was taken upon their pursuit, tho this doth consequentially discharge the hundred upon the statute of *Winton*, & 27 *Eliz.* cap. 13. [281]

A. brings an action against *B.* wherein *C.* is produced as a witness for *A.* and *A.* recovers upon his testimony, *C.* is thereupon indicted of perjury *contra formam statuti* (*) *ad grave dampnum ipsius B.* *C.* pleads *not guilty*, ruled that *B.* shall not be received to give evidence against *C.* because he is the party grieved, and shall recover 20*l.* *M.* 1650. *B. R. Bacon's case*, 2 *Rol. Abr.* 685. pl. 4. and yet it seems he shall not recover the 20*l.* upon the indictment, but must bring his action upon the statute; and yet constant experience, and the very statute of 21 *H.* 8. cap. 11. that gives restitution of goods to the party prosecuting an indictment of felony makes it evident, that he may be, and indeed ought to be the witness to convict the felon, tho thereupon he is to have restitution of the goods stolen.

If the tenant robs his lord, or the lessee for life the reversioner, or a resiant the lord of the franchise that hath *bona felonium*, these may be witnesses upon an indictment or trial of the felon, notwithstanding the consequential advantage that accrueeth by the attainder or conviction of the party, yet the credibility of their testimony is to be left to the jury. But if *A.* hath a promise or grant of the goods of *B.* arrested of felony in case he be convicted, I should never allow *A.* to be a witness

(*f*) 2 *R. A.* 685. pl. 3.

(*g*) 2 *R. A.* 685. pl. 6. *Syl.* 233. but this is now altered by 8 *Geo* 2. cap. 16. for by that statute, "Any person inhabiting within the hundred or any franchise thereof shall be admitted as a witness on

"behalf of the hundred in the same manner, as if he were not an inhabitant of that hundred, but resided in any other hundred whatsoever.

(*) *Viz.* 5 *Eliz.* cap. 9.

to convict *B.* for he by his own act after the felony committed acquires the interest, and so acts and swears for his own advantage.

A. brings an appeal against *B.* for the death of *C.* his father or her husband, *A.* cannot be a witness against *B.* upon *not guilty* pleaded, because it is his or her own suit.

[282] But if *A.* be nonsuit upon the appeal, and so the prisoner is arraigned upon the appeal at the king's suit, now *A.* may be a witness, because now the prosecution is merely for the king.

If a man be indicted of high treason, the king cannot by his great seal or *ore tenus* give evidence, that he is guilty, for then he should give evidence in his own cause; *vide supra*, cap. 28. p. 217. & Part I. cap. 26. p. 344. the case of the earl of Lancaster.

Nay, altho he may in person sit on the king's bench, yet he cannot pronounce judgment in case of treason, but it is performed by the senior judge, for as he cannot be a witness, so he cannot be a judge *in propria causa*.

And the same law is for felony for the same reason, yet in some cases the king's testimony under his great seal is allowable, as in an *essoins de servitio regis*, the warrant under the great seal (*h*) is a good testimonial of it. *F. N. B.* 17. *Stat. Glouc.* cap. 8.

Now as touching the compulsory means to bring in witnesses they are of two kinds. 1. By process of *subpœna* issued in the king's name by the justices of peace, *oyer* and *terminer*, gaol-delivery, or king's bench, where the plea of *not guilty* is to be tried. 2. Which is the more ordinary and more effectual means, the justices or coroner that take the examination of the person accused, and the information of the witnesses, may at that time, or at any time after, and before the trial bind over the witnesses to appear at the sessions, and in case of their refusal either to come or to be bound over, may commit them for their contempt in such refusal, and this is virtually included within their commission and by necessary consequences upon the statute of 1 & 2 *P. & M.* cap. 13. whereof before, p. 52.

But that which is a great defect in this part of judicial administration, is, that there is no power to allow witnesses their charges, whereby many times poor persons grow weary of attendance, or bear their own charges therein to their great hindrance and loss. (*)

II. As

(b) But not under the privy seal. 2 Co. Inst. 314. *super stat. Gloucester*.

(*) On conviction, in general, for any felony, the reasonable expences of prosecution

II. As to the second matter in what manner the evidence is to be given.

Regularly the evidence for the prisoner in cases capital is given without oath, tho the reason thereof is not manifest, (*i*) but [otherwise it is] in all cases not capital, tho it be misprision of treason: neither is counsel allowed him (*k*) to give evidence to the fact, nor in any case, unless matter of law doth arise. 1 *H.* 7. 23. *Co. P. C.* p. 137.

But in some special felonies by act of parliament the prisoner's witnesses in cases capital shall be examined upon oath at his trial, namely the statute of 31 *Eliz. cap.* 4. against imbezzelling of the king's ordinance, giving liberty to the prisoner to make lawful proof by witness or otherwise, seems virtually to allow the prisoner's testimony upon oath. *Co. P. C. cap.* 22. p. 79.

And the statute of 4 *Jac. cap.* 1. touching felonies upon the borders, &c. gives examination of the prisoner's witnesses upon oath.

If a witness be produced and sworn for the king, yet if that witness alledge any matter in his evidence, that is for the prisoner's advantage, (as many times they do,) that stands as a testimony upon oath for the prisoner, as well as for the king.

Regularly the king's evidence is given upon oath against the prisoner, and ought not to be admitted otherwise than upon oath; nay, instances have been given of very young witnesses sworn upon evidence in capital causes, viz. one of nine years old. *Dal.* [284] *ton's Justice, cap.* 111. p. 297. (*l*)

Yet such very young people under twelve years old I have not known examined upon oath, but sometimes the court for their infor-

cution are by *stat.* 25 *Geo.* 2. c. 36. to be allowed to the prosecutor out of the county stock, if he petitions the judge for that purpose; and by *stat.* 27 *Geo.* 2. c. 3. poor persons, bound over to give evidence, are likewise intitled to be paid their charges, as well without conviction as with it.

(*i*) Nay, it is manifestly against all reason, that the prisoner should not be allow'd the same liberty to make out his innocence, as is allowed to prove his guilt, and tho it has been an usual practice not to suffer witnesses for the prisoner in capital cases to be examined upon oath, yet as lord Coke observes *P. C. p.* 79. there is not so much as *scintilla juris* for it, it being unsupported by any act of parliament, antient author, book case, or record: See Sir John Hawles's remarks on *College's trial. State Tr. Vol.* IV.

p. 178. To remedy this inconvenience it was provided by 7 *W. cap.* 3. "That every person indicted for high treason, whereby corruption of blood may be made, shall be admitted to make his defence by witnesses on oath," but this statute being defective it is further provided by 1 *Ann cap.* 9. "That the witnesses for the prisoner in any trial for treason or felony shall give their evidence upon oath in like manner, as the witnesses for the crown, and if convicted of perjury shall be subject to the same penalties, forfeitures, &c."

(*k*) Upon an indictment, but it is otherwise in an appeal. *Corone* 31. 9 *E.* 4. 2. a. 1 *H.* 7. 26. a.

(*l*) *N. Edit. cap.* 164. p. 541.

mation

mation have heard their testimony without oath, which possibly being fortified with concurrent evidences may be of some weight, as in cases of rape, buggery, witchcraft, and such crimes, which are practised upon children: *vide supra*, Part I. *cap.* 24. *p.* 302 & *cap.* 58. *p.* 634. & *supra*, *p.* 279.

2 Hawk. P. C. ch. XLVI. of evidence per tot. Burn. tit. evidence. 4. Blacks. Com. ch. 27. *pa.* 356, 360. See Index to Foster. tit. Evidence. Overt-acts. Witnesses. 2. Wilson: 18. *seems Contra*. 1. Wilson. 84. 1. Atk. 21.

C H A P. XXXVIII.

Concerning evidence in writing.

BY the statute of 1 & 2 P. & M. *cap.* 13. and 2 & 3 P. & M. *cap.* 10. Justices of peace and coroners have power to take examinations of the party accused, and informations of the accusers and witnesses, (the examinations to be without oath, the informations to be upon oath,) and are to put the same in writing, and are to certify the same to the next gaol-delivery.

These examinations and informations thus taken and returned may be read in evidence against the prisoner, if the informer be dead, or so sick, that he is not able to travel, and oath thereof made; otherwise not.

But then, 1. Oath must be made either by the justice or coroner, that took them, or the clerk that wrote them, that they are the true substance of what the informer gave in upon oath, and what the prisoner confessed upon his examination. 2. As to the examination of the prisoner, it must be testified, that he did it freely without any menace, or undue terror imposed upon him; for I have often known the
 [285] prisoner disown his confession upon his examination, and hath sometimes been acquitted against such his confession; and the reason why these examinations and informations are allowable in evidence (under the cautions above premised,) is, because they are judges of record, and the informations before them upon oath are authorised and required by act of parliament, and they are judges of the crimes upon which the informations are taken.

Welsh forceably took away Mrs. *Puckring* and married her, and thereupon a temporary act of parliament was obtained, enabling commissioners

missioners therein named to hear and determine that marriage, and to dissolve it, if there were cause: In that cause Mrs. *Puckring* herself was examined touching the manner of the marriage, as a supplemental proof, and died hanging the suit, *Welsh* was after indicted upon the statute of 3 *H.* 7. for this fact for felony, and it was moved, that this examination of Mrs. *Puckring* might be read in evidence against the prisoner, but it was denied. 1. Because it was a proceeding according to the civil law in a civil cause. 2. Because that suit was originally at the instance of Mrs. *Puckring* and her own cause, and tho she be according to the civil law examinable, as a supplemental proof, yet it was a cause for her own interest, and therefore at common law not allowable, tho the commissioners that took the examination were judges constituted by that which then was allowed to be an act of parliament. *M.* 1652. *B. R.*

A. commits a felony in the county of *B.* and flies into the county of *C.* and there is taken and brought before a justice of peace of the county of *C.* where *A.* is examined, and informations upon oath taken by that justice, tho the justice of peace of the county of *C.* had not an original cognisance of a felony committed in the county of *B.* yet these examinations and informations being transmitted into the county of *B.* where *A.* is indicted, may be read in evidence against him. *Dalt. Just. cap.* 111. *p.* 299. for tho he hath not an original jurisdiction of the cause, yet he hath a consequential jurisdiction thereof, having the party before him, and it is in order to the preservation of the peace.

If a justice of peace takes information in a case of high treason, it seems these cannot be read in evidence upon an indictment of treason, because high treason is not within that commission, but it is of use only, as an information upon oath, which they may take, tho they cannot proceed upon it, for all treason is a breach of the peace; *quære tamen*, if it be not allowable to be given in evidence. [286]

See Burn. Tit. Evidence, Sect. II. of written evidence.

C H A P. XXXIX.

Concerning evidences requisite, or allowed by acts of parliament, and presumptive evidence.

BY the statutes of 1 *E. 6. cap. 12.* 5 *E. 6. cap. 12.* there ought to be two witnesses to an indictment of high treason, and these witnesses are to be sworn before the jury also upon his trial, unless he willingly without violence confess the same.

These two witnesses are still required upon his indictment, and it is not altered by the statute of 1 & 2 *P. & M. cap. 10.* which restores the common law trial, but extends not to the indictment. *Co. P. C. cap. 2. p. 25. vide supra, Part I. p. 298.*

A confession upon examination before a competent judge before indictment is such a confession, as the statute allows. *Co. P. C. ubi supra,* and so it was agreed in the case of *Tonge* and others, 14 *Car. 2. (a)*

If one witness be positive, and the other witness is only by hearsay, these are not two lawful accusers within the statute, agreed by all the justices in the lord *Lumley's* case *Hill. 14 Eliz. cited Co. P. C. ubi supra* against the opinion in *Dy. 99. b. Thomas's* case; but two witnesses are not requisite either upon the indictment or trial of treasons for counterfeiting money by the express proviso of the statute of 1 & 2 *P. & M. cap. 11.* which directs, that in all treasons for counterfeiting or impairing of coin the offenders shall be indicted, arraigned, tried, convicted and attaint by such evidence, and in such manner as was used before. 1 *E. 6.*

The words of the statute 5 & 6 *E. 6. cap. 11.* are, “That no person shall be indicted, convicted, or attaint for any the treasons afore said, or for any other treasons, that now be, or hereafter shall be, which shall hereafter be perpetrated, committed or done, unless the same offender be thereof accused by two lawful accusers, &c.” It may be considerable, whether this act extends to treasons *de novo* made by act of parliament after 5 & 6 *E. 6. (b)*

If such new treasons be enacted after, as that of 5 *Eliz. cap. 11.* and 18 *Eliz. cap. 1.* concerning clipping and washing of coin, and also 1 *Mar. cap. 6.* which have this expression (*being thereof lawfully con-*

(a) *Kel. 18. vide Part I. p. 304.*

(b) See *Kel. 9, 1^o, 49. vide Part I. p. 297.*

viſt or attaint, according to the due order and courſe of the laws of this realm ſhall ſuffer death, &c.) there ſeems to be no neceſſity of two witneſſes upon the indictment or trial. 1. Becauſe, *according to the due order and courſe of the laws* ſeems to intend common law (*c*). 2. But if there were doubt of that, yet in theſe acts concerning coin the ſtatute of 1 & 2 P. & M. cap. 11. enacts, “ That all offenses con-
“ cerning counterfeiting, forging, or impairing any coin current
“ within the realm, ſhall be indicted, arraigned, tried, convicted and
“ attaint by ſuch evidence, and in ſuch manner,, as hath been uſed
“ before the firſt year of E. 6.” therefore, if the ſtatute of E. 6. ſhould be conſtrued to refer to any future ſtatute making treaſon, there will be the ſame reaſon to carry over the ſtatute of 1 & 2 P. & M. cap. 11. to the treaſons enacted againſt impairing of coin by 5 & 18 Eliz.

But yet, as to other treaſons, it may be very questionable, [288] whether 5 & 6 E. 6. doth as to this point extend to treaſons newly enacted after, 1. Becauſe tho a former act may direct the proceedings upon a new offense made after, (as the ſtatutes of 18 Eliz. cap. 5. 31 Eliz. cap. 5. concerning informers, 21 Jac. cap. 4. concerning ſuing informations in the proper county, and pleading the general iſſue,) yet this doth not *in terminis* extend to offenses to be committed againſt ſtatutes to be made, but only in all other treaſons hereafter to be committed (*d*). 2. Becauſe moſt commonly in the acts, that after 5 & 6 E. 6. enacted new treaſons, if the parliament intended two lawful witneſſes, it moſt commonly expreſſeth it accordingly; *quære*, for 1 & 2 P. & M. cap. 11. ſeems to import, that in new treaſons concerning counterfeiting foreign coin made current by proclamation, there would have been a neceſſity of two witneſſes by the ſtatute of 5 & 6 E. 6. and therefore provides againſt it.

By the ſtatute of 21 Jac. cap. 27. the mother of a baſtard child concealing it's death ſhall ſuffer as in murder, unleſs ſhe prove by one witneſs, that the child was born dead; this ſtatute ſtands yet continued

(*c*) I cannot ſee why theſe general words ſhould be confined only to the *common law*, ſince *the laws* in the plural number do as fully expreſs, and ſeem moſt naturally to include all the laws of the land, whether *common or ſtatute*.

(*d*) The ſtatute of 5 & 6 E. 6. ſeems *expreſſly & in terminis* to extend to treaſons, which ſhould be afterwards enacted; what elſe can be the meaning of the words, *any other treaſons, that now be, or hereafter ſhall be*? for theſe words cannot reaſonably be

intended only of offenses hereafter to be committed, becauſe that is provided for by the other words immediately following, *which ſhall hereafter be perpetrated, committed or done*: but to obviate all doubts, it is ſince provided by 7 W. 3. cap. 3. “ That
“ in all caſes of high treaſon, whereby any
“ corruption of blood ſhall enſue, no per-
“ ſon ſhall be indicted, tried or attainted,
“ but upon the oaths of two lawful wit-
“ neſſes.

among many others by a clause in the latter end of the act for relief of the northern army. 16 *Car.* 1. *cap.* 4. (*) until by parliament it be otherwise enacted.

The indictment to put the prisoner to this proof by one witness, that the child was dead born, must contain this special matter, that the prisoner was delivered of a child, which by the laws of the kingdom was a bastard, and that it was born alive, and shew how she killed it.

[289] But the indictment need not allege, that she concealed it, but it must be proved upon evidence, (d) if advantage be taken of this statute against her.

The indictment doth not conclude *contra formam statuti*, for the statute only directs the evidence, where the case is within it, but created not a new crime. (e)

If there be no concealment proved, yet it is left to the jury to inquire, whether she murdered it or not, by those circumstances that occur in the case, as if it be wounded or hurt, &c. but it doth not put her upon an absolute necessity of proving it born alive by one witness, and so the evidence stands but as at common law.

If upon the view of the child it be testified by one witness by apparent probabilities, that the child was not come to it's *debitum partus tempus*, as if it have no hair or nails, or other circumstances, this I have always taken to be a proof by one witness, that the child was born dead, so as to leave it nevertheless to the jury, as upon a common law evidence, whether she were guilty of the death of it or not.

In some cases presumptive evidences go far to prove a person guilty, tho there be no express proof of the fact to be committed by him, but then it must be very warily pressed, for it is better five guilty persons should escape unpunished, than one innocent person should die.

If a horse be stolen from *A.* and the same day *B.* be found upon him, it is a strong presumption that *B.* stole him, yet I do remember before a very learned and wary judge in such an instance *B.* was condemned and executed at Oxford assises, and yet within two assises after *C.* being apprehended for another robbery and convicted, upon his judgment and execution, confessed he was the man that stole the horse, and being closely pursued desired *B.* a stranger to walk his horse for him, while he turned aside upon a necessary occasion and escaped; and *B.* was apprehended with the horse, and died innocently.

(*) *Vide* 3 *Car.* 1: *cap.* 5. §. 22. *in fine.*

(d) If no intent to conceal, it is not murder within the statute, tho no body

were present at the time of the delivery. *Kelc* 33.

(e) See *Ann Davis's* case, *Kel.* 32.

I would

I would never convict any person for stealing the goods *cujusdam ignoti* merely because he would not give an account how he came by them, unless there were due proof made, that a felony was committed of these goods.

I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least the body found dead (*f*), for the sake of two cases, one mentioned in my lord *Coke's P. C. cap. 104. p. 232.* a *Warwickshire* case (*g*).

Another that happened in my remembrance in *Staffordshire*, where *A.* was long missing, and upon strong presumptions *B.* was supposed to have murdered him, and to have consumed him to ashes in an oven, that he should not be found, whereupon *B.* was indicted of murder, and convicted and executed, and within one year after *A.* returned, being indeed sent beyond sea by *B.* against his will, and so, tho *B.* justly deserved death, yet he was really not guilty of that offense, for which he suffered.

But of all difficulties in evidence there are two sorts of crimes, that give the greatest difficulty, namely rapes and witchcraft, wherein many times persons are really guilty, yet such an evidence, as is satisfactory to prove it, can hardly be found; and on the other side persons really innocent may be entangled under such presumptions, that many times carry great probabilities of guilt. *Tutius semper est errare in acquietando quàm in puniendo, ex parte misericordiæ, quàm ex parte justitiæ.*

See 2 Hawk. P. C. ch. 46. sect. 42! 43.

(*f*) This was also a rule in the civil law. *Dig. Lib. XXIX. Tit. 5. §. 24.*

(*g*) That case was thus, An uncle, who had the bringing up of his niece, to whom he was heir at law, correcting her for some offence, she was heard to say, *Good uncle do not kill me*; after which time the child could not be found, whereupon the uncle was committed upon suspicion of murder, and admonished by the justices of assize to find out the child by the next assizes, against which time he could not find her, but

brought another child as like her in person and years as he could find and apparelled her like the true child, but on examination she was found not to be the true child; upon these presumptions he was found guilty and executed; but the truth was, the child being beaten ran away, and was received by a stranger, and afterwards, when she came of age to have her land, came and demanded it, and was directly proved to be the true child.

C H A P. XL.

Concerning variance between the indictment and evidence, and where the evidence proves the indictment, and where not.

IF *A.* be indicted, that the first of July 21 Car. 2. he robbed or murderd *B.* and upon evidence it appears, that it was committed another day, or another year, either after or before the time laid in the indictment, yet this proves the issue for the king; only it is requisite, if there be an escheat in the case, and that the felony were committed after the day laid in the indictment, for the jury to find the day, because the relation of the escheat to avoid mesne grants and incumbrances relates to the time of the felony committed 32 Eliz. per omnes justic' Co. P. C. cap. 104. p. 230.

If *A.* be indicted for a robbery or murder apud *A.* in com' *B.* if it were committed in another county, regularly he ought to be found *not guilty*, because regularly an offense of that nature in one county is not presentable out of the county where it was done, but tho it were done in another vill in the county of *B.* yet he is to be found guilty, for the vill is not material.

If the evidence in murder differ from the indictment in *specie mortis*, as if the indictment were for killing by poison, and the evidence be of killing by stabbing, it doth not maintain the indictment. 9 Co. Rep. 67. a. Mackally's case.

But if the indictment were for poisoning with one kind of poison, and the proof be of another kind of poison, or the indictment be for killing with a sword, and the evidence be of killing with a staff, or with a gun, it maintains the indictment, for the common effectual word in both is *percussit*: vide 9 Co. Rep. 67. a. Mackally's case, Co. P. C. cap. 62. p. 135. Sir Thomas Overbury's case. (a)

[292] And the same law holds in relation to the accessaries to such principals, and with the same difference.

If *A. B.* and *C.* be indicted for the murder of *D.* and it is laid in the indictment, that *A.* gave him the stroke, whereof he died, and that *B.* and *C.* were *præsentes, auxiliantes & abettantes*, tho upon the evidence it appears, that *B.* alone gave the stroke, whereof he died,

(a) Stat. Tr. Vol. 1. p. 113.

and *A.* and *C.* were *præsentes, auxiliantes & abettantes*, it maintains the indictment, for they are all principals, *Mackally's case, ubi supra. (b)*

If *A.* and *B.* be indicted of the murder of *C.* and upon the evidence it appears, that *A.* committed the fact, and *B.* was not present, but was accessory before the fact by commanding it, *B.* shall be discharged. 26 *H.* 8. 5.

If *A.* and *B.* be indicted as principal, and *C.* is indicted as accessory to both after the fact done, *A.* and *B.* are convicted, or only *A.* is convicted, and upon the evidence against *C.* it appears he was accessory only to *A.* it maintains the indictment. 9 *Co. Rep.* 119. *a.* lord *Sanchar's case per curiam. (c)*

A. is indicted for murdering *B.* *ex malitiâ præcogitatâ*, evidence of malice in law, as killing an officer or watchman in the execution of his office, or killing a man without any provocation maintains the indictment, because the law interprets it malice. 4 *Co. Rep.* 67. *b.*

A. is specially indicted upon the statute of 1 *Jac. cap.* 8. for stabbing *B.* not having a weapon drawn, nor stricken first, *contra formam statuti*, upon the evidence it appears, that the person kild struck first, yet it is good evidence to convict *A.* for manslaughter. *H.* 23 *Car.* 1. *Harwood's case. (d)*

So if *A.* be indicted for petit treason for killing his master *felonicè, proditoriè, & ex malitiâ suâ præcogitatâ*, tho he were not his master, he may be found guilty of murder, *(e)* and tho it were not *ex malitiâ præcogitatâ*, he may be found guilty of manslaughter, and not guilty as to the petit treason; and so I have known it ruled oftentimes.

So if a man be indicted of burglary, and *quòd felonice & burglariter cepit bona, &c.* he may be acquit of the burglary, [293] and found guilty of simple felony, if the evidence riseth no higher.

So if a man be indicted of murder *ex malitiâ præcogitatâ*, an evidence proving the killing upon a sudden falling out is a good evidence to prove him guilty of manslaughter, and the jury ought accordingly to find it. *Plow. Cam.* 101. *a.* *Co. Lit.* 282. *a.* And so in an appeal.

^a Hawk. P. C. ch. 46. sect. 36, 37, 38, &c. &c.

(b) See 1 *Salk.* 334. *Wallis's case.*

(c) Vide Part I. p. 624.

(d) *Style* 86.

(e) Vide Part I. p. 378. & postea, cap. 46. sub fine.

CHAP. XLI.

Concerning the demeanor of the jury, and how their verdict is to be given.

AFTER the arraignment of the prisoners, and their pleas of *not guilty* received and recorded, the sheriff returns the pannel of the jury, the prisoners are again called to the bar, and the jury being called, and appearing the prisoners are told by the clerk, that these good men now called and appearing are to pass upon their lives and deaths; therefore, if they will challenge any of them, they are to do it before they are sworn.

If no challenge hinder, the jury are commanded to look on the prisoners, and then severally twelve of them, neither more nor less, are sworn, *You shall well and truly try, and true deliverance make between our sovereign lord the king and the prisoners at the bar, whom you shall have in charge, [and true verdict give] according to your evidence. So help you God.*

After the jury sworn proclamation is to be made, "That if any
" can inform for our lord the king against the prisoners at the bar,
" let them come forth and they shall be heard;" then the prisoners
[294] are called successively to the bar, first *A.* and he is com-
manded to hold up his hand, the indictment is repeated,
" To this he hath pleaded *not guilty*, the issue is to try, whether he
" be guilty or not guilty; if you find him *guilty*, you shall say so,
" and inquire what goods or chattels, lands or tenements he had at
" the time of the felony or treason committed, or at any time after.
" And if you find him *not guilty*, you shall inquire, whether he did
" fly for it, and if you find, that he fled for it, you shall inquire of
" his goods and chattels, and if you find him *not guilty*, and that he
" did not fly for it, you shall so and no more. Hear your evidence."

I have set down the clerk's charge to the jury, because it contains the effect of their inquiry.

Tho there be twenty prisoners at the bar for several felonies, and the oath is general to try between the king and the prisoners at the bar, yet the jury is to inquire of no more than what they are particularly charged with, as before; and therefore, tho twenty have plead-
ed,

ed, and stand at the bar when the jury is sworn, yet the court may stay at any number of the prisoners, and so the jury stand charged with no more than what are thus particularly charged upon them.

And when they go from the bar, and have brought in their verdict touching these particulars thus charged upon them, then, if the same jury pass upon the remaining prisoners, yet they are to be called over again, the prisoners reminded of their challenges, and the jury sworn *de novo* upon the trial of the rest of the prisoners.

For in law the jury is charged with no more than those, that have their indictments and plea of *not guilty*, and evidence concluded against and for them before the jury, tho possibly all the prisoners, that have pleaded, stood at the bar, when the jury was first sworn; and this is the constant course at *Newgate*.

By the antient law, if the jury sworn had been once particularly charged with a prisoner, as before is shewed, it was commonly held they must give up their verdict, and they could not be discharged before their verdict given up, and so is my lord *Coke, P. C.* [295] *cap. 47. p. 110.* and this is the reason given 22 *E. 3. Coron.*

449. why after the plea of *not guilty*, and the inquest charged, the prisoner cannot become an approver, because the inquest shall not be discharged; but the book at large, *viz. 21 E. 3. 18. a.* mentions not the charging of the inquest, but the plea of *not guilty* and the jury at the bar. *Co. Lit. 227. b.* But yet the contrary course hath for a long time obtained at *Newgate*, and nothing is more ordinary than after the jury sworn, and charged with a prisoner, and evidence given, yet if it appear to the court, that some of the evidence is kept back, or taken off, or that there may be a fuller discovery, and the offense notorious, as murder or burglary, and that the evidence, tho not sufficient to convict the prisoner, yet gives the court a great and strong suspicion of his guilt, the court may discharge the jury of the prisoner, and remit him to the gaol for farther evidence, and accordingly it hath been practised in most circuits of *England*, (a) for otherwise many

(a) And so it was practised in *Whitebread's* case in treason, see *State Tr. Vol. II. p. 710, 827.* See also *Kel. 47, 52.* But the reason given for this practise, if it were law, (which yet without the prisoner's consent is unwarranted by antient usage; *vide 3 Co. Inst. 110. Co. Lit. 227. b. 1 And. 103. Raym. 84. State Tr. Vol. II. p. 951.*) seems to hold as strongly in behalf

of the prisoner as of the king. *State Tr. Vol. IV. p. 190.* and yet I do not find any instance, where a jury once sworn was ever discharged, because the prisoner's evidence was not ready; on the contrary in lord *Ruffel's* case, the court refused to put off the trial only till the afternoon of the same day, pretending they could not do it without the consent of the attorney general, altho

many notorious murders or burglaries may pass unpunished by the acquittal of a person probably guilty, where the full evidence is not searched out or given.

If after the jury sworn and departed from the bar, one of them, viz. *A.* wilfully goes out of town, whereby only eleven remain, these eleven cannot give any verdict without the twelfth, but the twelfth shall be fined for his contempt, and that jury may be dis-

[296] charged, and a new jury sworn, and new evidence given, and the verdict taken of the new jury, and thus it was done by good advice at the gaol-delivery at *Hertford Aug. 15. Car. 1.* in the case of *Hanscom* the departing juryman.

And so it is usual at the gaol-delivery at *Newgate*, if a jury be charged with several prisoners, and the court finds by probable circumstances, that the jury is partial to one of the prisoners, the court may discharge the jury of that prisoner, and put him upon his trial by another jury, and this is used also in other circuits. (*)

Upon *not guilty* pleaded twelve are sworn to try the issue, after their departure *A.* one of the twelve leaves his companions, which being discovered to the court, by consent of all parties *B.* another of the pannel is sworn in the place of *A.* and afterwards *A.* returns to his company, which being made known to the court, *A.* is called and examined why he departed, he answered to drink, and being examined, whether he had spoken with the defendant, denied it upon his oath, whereupon *B.* was discharged from giving any verdict, and the verdict taken of *A.* and the other eleven, and *A.* fined for his contempt, 34 *E. 3. Office de Court* 12. in trespass.

If thirteen are by mistake sworn, the swearing of the last of the thirteen is void, and the other twelve shall serve.

If only eleven be sworn by mistake, no verdict can be taken of the eleven, and if it be, it is error; and so in a presentment, but if twelve be recorded sworn, no averment lies, that one was unsworn. *Lamb's Justice* 395.

altho in that case the jury were not sworn, and the prisoner urged, that he had witnesses, who could not be in town till night, in which case it was certainly in the discretion of the court to put it off or not. *State Tr. Vol. III. p. 630, 631.* It hath however been since holden for law, that a jury once charged in a capital case cannot be discharged, till they have given their

verdict, and the case of *Whitebread* was thought a very extraordinary one. See lord *Delamere's* case, *State Tr. Vol. IV. p. 232.* and *Rockwood's* case, *State Tr. Vol. IV. p. 659, 661.* and *Cook's* case, *State Tr. Vol. IV. p. 751.* *Foster* 16, 39, 76, 328.

(*) *Quære de hoc.*

The

The justices at common law may upon a just cause remove a juror after he is sworn. 20 *H.* 6. 5. *a.*

When the jurors depart from the bar, a bailiff ought to be sworn to keep them together, and not to suffer any to speak with them.

After their departure they may desire to hear one of the witnesses again, and it shall be granted, so he deliver his testimony in open court, and also they may desire to propound questions to the court for their satisfaction, and it shall be granted, so it be in open court.

The jury must be kept together without meat, drink, fire, or candle, till they are agreed. 24 *E.* 3. 75. (*b*) *Co.* [297] *Lit.* 227. *b.*

If they agree not before the departure of the justices of gaol-delivery into another county, the sheriff must send them along in carts, and the judge may take and record their verdict in a foreign county; *quære*, whether in such cases the session may be adjourned before the verdict taken, 19 *Affiz.* 6. *per Scot.* 41 *Affiz.* 11.

If there be eleven agreed, and but one dissenting, who says he will rather die in prison, yet the verdict shall not be taken by eleven, no nor yet the refuser fined or imprisond, and therefore where such a verdict was taken by eleven and the twelfth fined and imprisond, it was upon great advice ruled the verdict was void, and the twelfth man deliverd, and a new *venire* awarded. 41 *Affiz.* 11. for men are not to be forced to give their verdict against their judgment (*c*); *vide P.* 20 *E.* 1. *Rot.* 43. *Norf. coram rege.*

In

(*b*) *N. Edit.* of year books 24. *a.*

(*c*) But is it not a force, when any of the jurors are obliged to comply under the peril of being starved to death, for how can it be expected, that twelve considering men should in all cases happen to be of the same sentiments? and therefore anciently it was not necessary, (at least in civil causes,) that all the twelve should agree, but in case of a difference among the jury, the method was to separate one part from the other, and then to examine each of them as to the reasons of their differing in opinion, and if after such examination both sides persisted in their former opinions, the court caused both verdicts to be fully and distinctly recorded, and then judgment was given *ex dicto majoris partis juratorum*; thus in a great assise upon a writ of right between the abbot of *Kirkstede* and *Edmund de Eyncourt* eleven of the jury found for the abbot, and one for *Edmund de Eyncourt*, in this case the verdict of the eleven was

first recorded, *Robertus de Harblinge & omnes alii præter Radulphum filium Simonis dicunt super sacramentum suum, &c.* and then follows the *dictum* of the twelfth *Et prædictus Radulphus filius Simonis dicit super sacramentum suum, &c.* then follows the judgment, *Sed quia prædicti undecim concorditer & precipue dicunt, quod prædictus abbas & ecclesia sua prædicta majus jus habeant tenendi &c. ideo consideratum est, quod prædictus abbas & successores sui teneant prædicta tenementa de cætero in perpetuum, &c.* *Placita coram justic' itinerant' in com' Lincoln anno 56 Hen. 3. Rot. 29. in dorso.*

In an assise of novel disseisin between *William Tristram* plaintiff, and *John Simenel* and others defendants, where the whole jury consisted of only eleven, ten found for *Tristram*, and one for *Simenel*, and both verdicts are recorded in this manner, *Decem jurati dicunt, quod, &c. & undecimus juratorum, scilicet Johannes Kineth dicit, &c. Et, quia dicto majoris partis juratorum standum*

In capital causes, whether upon indictment or appeal, no verdict can be given by default in the absence of the party. 16 *Affiz.* 13.

[299] But if the prisoner hath pleaded to the country, and when he is to be tried will say nothing, yet no penance shall be inflicted, but the jury shall be taken. 15 *E.* 4. 33. *b.*

Now touching the giving up of their verdict, if the jury say they are agreed, the court may examine them by poll, and if in truth they are not agreed, they are fineable. 29 *Affiz.* 27. 40 *Affiz.* 10.

If the jurors by mistake or partiality give their verdict in court, yet they may rectify their verdict before it is recorded, or by advice of the court

dum est, quod prædictus Williolmus recuperet seisinam suam de prædictis tenementis versus prædictos Johannem & alios per visum recognitorum & dampna quæ taxantur per jur' ad duas marcas & Johannes & alii in misericordia. Pas. 14 E. 1. Rot. 10. coram Rege.

The like practice is supposed in the case here quoted by the author. *Pas. 20 E. 1. Rot. 43. coram rege*, which was thus, *Martin Fitz-Osbert* recovered seisin of certain lands, &c. in *West-Somerton* against the prior of *Buttelye* before *John de Lovetot* and *William de Pageham*, judges of assise in *Norfolk* anno 16 *E. 1.* The prior afterwards complained greatly, that injustice had been done him by *Lovetot* at the said assise, and thereupon the bishop of *Winchester* and others were ordered to hear the matter and do justice to the prior. Upon this *Lovetot* and *Pageham* were called before the said bishop, &c. and the prior objected to *Lovetot*, "Quod fieri fecit falsam ir-
"rotulationem in rotulis suis, & contra-
"riam veredicto juratorum assisæ prædic-
"tæ, &c. & hoc paratus est verificare per
"prædictos juratores, qui omnes sunt su-
"perstites, &c." To which *Lovetot* and *Pageham* replied by justifying themselves, and insisting, "Quod benè, & ritè pro-
"cesserunt ad captionem illius assisæ, unde
"vocant recordum rotulorum suorum,
"&c." in which the judgment pronounced by *Lovetot* was entered in the following manner, "Et quia per prædictum assisam
"convictum [compertum] fuit, quod *Ed-
"ricus*, de quo prædictus *Martinus* exivit,
"fuit liber homo & liberæ conditionis;
"& quamvis ipse *Edricus*, & exitus de
"ipso proveniens tenuissent de prædicto
"Priore & de prædecessoribus suis, tene-
"menta sua in villenagio, & per villana
"servitia, hoc eis non præjudicat, quod
"minus corpora sua sint libera; eò quod
"nulla præscriptio temporis potest libe-
"rum sanguinem in servitutem reducere,
"ideo consideratum est, quod prædictus

"*Martinus* recuperet inde seisinam suam,
"&c. Et *Johannes de Pykering* unus re-
"cognitorum præfatæ assisæ, pro eo quod
"in veredicto præfatæ assisæ, narrando
"illud veredictum, contrarius fuit omni-
"bus aliis recognitoribus, narrando aliud
"quàm inter illos fuit provisum, sicut per
"examinationem eorum convictum [com-
"pertum] fuit, & mancaptus est per, &c.
"ideò ipse & mancaptores sui in miseri-
"cordiâ. Et præceptum est vic', quod
"capiat prædictum *J. de Pykering*, & sal-
"vo, &c. ita quod habeat corpus ejus apud
"Kenteford, &c. ad faciendam redempti-
"onem suam pro transgressione prædicta." The bishop of *Wynton* and his fellows then proceeded to examine *Lovetot* and *Pageham* touching the said judgment. "Et
"quia in consideratione super veredicto
"primæ assisæ compertum est, quod *J. de
"Pykering* unus recognitorum prædictæ
"assisæ, narrando illud veredictum, con-
"trarius fuit omnibus aliis recognitoribus,
"narrando aliud quàm inter eos fuit pro-
"visum; & nichil de illo contrario in re-
"cordo prædicto specificatur sive decla-
"ratur; immo quod veredictum captum
"fuit & receptum, ac si omnes de uno &
"de eodem assensu fuissent in veredicto
"prædicto; nec etiam veredictum ipso-
"rum undecim declaratur sive specificatur,
"&c. nec duodecim ab undecim fuit
"separatus, nec examinatus per se; nec
"undecim à duodecimo fuerunt separati,
"nec per se examinati &c. prout moris est
"in tali casu; & sic ex contrario veredicto
"subsecutum fuit judicium non legi sive
"consuetudini regni consonum, videtur
"manifestè, quod recordum illud non est
"plenum, seu perfectum, in hoc casu, &c.
"Concordatum est quod assisa prædicta
"re-examinatur, &c." Upon this the sheriff was ordered, quod venire faciat hic
&c. recognitores assisæ prædictæ, & quod
scire faciat *Martin* to appear at the same
day ad audiendum, &c. "Postea ad præ-
dictum diem venerunt recognitores as-
sisæ

court go together again and consider better of it, and alter what they have delivered. *Plow. Com.* 211. *b.* *Saunder's* case.

But if the verdict be recorded, they cannot retract nor alter it. *Co. Lit.* 227. 7 *R.* 2. *Coron.* 108. 20 *Affiz.* 12. 5. *H.* 7. 22. *b.*

In a case of felony or treason the verdict must be given in open court, and no privy verdict can be given. *Co. Lit.* 227. *b.* *Co. P. C.* 110.

If a man be arraigned upon an inquest of murder or manslaughter taken by the coroner, and be found *not guilty*, the jury that acquits him ought to inquire, who committed the fact, and that shall serve as an indictment against that person, that the jury find did the fact.

“*sisæ prædictæ. Et quia prædicti Johanne*
 “*nes & Willielmus aliud recordati fuerunt,*
 “*quàm compertum fuit per recordum ro-*
 “*tulorum ipsius Johannis; & etiam quia*
 “*juratores prædicti minùs sufficienter fue-*
 “*runt examinati super articulis prædictis,*
 “*sicut patet in recordo prædicto, iteratò*
 “*fuerunt juratores jurati, & examinati;*
 “*qui dicunt super sacramentum suum,*
 “*quòd prædictus Martinus fuit villanus*
 “*ipsius Prioris die quo ejectus fuit de præ-*
 “*dictis tenementis, &c. Et quia com-*
 “*pertum est, &c. & quòd Prior ad præ-*
 “*dictam assisam coram præfatis J. & W.*
 “*respondebat per ballivum suum, qui qui-*
 “*dem ballivus non potuit deducere in ju-*
 “*dicium jus sanguinis nativi domini sui*
 “*absque præsentia domini sui, &c. ac*
 “*etiam in supradicto recordo quòd nulla*
 “*præscriptio longi temporis potest liberum*
 “*sanguinem in servitutem reducere, quòd*
 “*omninò falsum est, &c. videtur, quòd*
 “*judicium J. de Lovetot erroneum est;*
 “*ideò consideratum est, quòd prædictus*
 “*Prior rehabeat prædicta tenementa, ita*
 “*quòd omnia sint in eodem statu, in quo*
 “*fuerunt ante captionem prædictæ assisæ.”*
 Afterwards by writ of error the record co-
 ram episcopo Wynton and sociis suis audi-
 toribus querelarum was brought coram
 rege, and *Martin Fitz-Osbert* assigned for
 error, that he had recovered seisin against
 the said Prior “in grosso veredicto super
 “disseisinâ secundum legem communem;
 “& auditores sine brevi regis inde eis di-
 “recto, & sine aliquâ præmuntione ipso
 “*Martino* ritè factâ, contra legem commu-
 “nem, ipsum à prædicto tenemento abju-
 “dicaverunt, & contra tenorem Magnæ
 “Cartæ domini regis: Dicit insuper, quòd
 “prædicti auditores venire fecerunt coram
 “eis juratores præfatæ assisæ in formâ cer-
 “tificationis, & ipsos juratores per sacra-
 “mentum suum reexaminaverunt & admi-
 “serunt veredictum eorum contrarium ve-

“redicto per ipsos priùs pronuntiato; un-
 “de dicit, quòd in hiis & aliis erratum est,
 “&c.” To this the prior replied, that
 the said *Martin* had been “Præmunitus per
 “breve, quod vocatus *seire facias*; & quòd
 “prædicti auditores habuerunt plenam po-
 “testatem, tam per breve domini regis,
 “quàm per speciale præceptum domini
 “regis, ad corrigenda recorda justiciario-
 “rum vitiosa & erronea inventa & hoc
 “satis constat domino regi & ipso confi-
 “lio, & quòd prædictus *Martinus* non re-
 “cuperavit per grossum veredictum; quia
 “non fuit ibi veredictum nisi tale, quale
 “imperfectum, quia per xi juratores cap-
 “tum; & quòd prædicti auditores non ad-
 “miserunt contrarium veredictum priori
 “veredicto, quia veredictum priùs captum
 “coram J. de Lovetot fuit tale, quale im-
 “perfectum, & contra legem terræ captum
 “per xi juratores, de statu sanguinis ultra
 “tempus limitatum; secundum veredic-
 “tum magis deberet dici suppletio prioris
 “veredicti defectivi, quàm eidem contra-
 “rari.” To which *Martin* rejoined, and
 insisted, “Quòd prædicta assisa fuit plena
 “& perfecta coram J. de Lovetot & sociis
 “suis justic’ capta, & hoc liquat expressè
 “in eodem recordo, ubi dicit *Jurati di-*
 “*cunt*, &c. Et quòd ipse recuperavit præ-
 “dicta tenementa per grossum veredictum
 “præfatæ assisæ, petit judicium, si præ-
 “dictum grossum veredictum super dissei-
 “sinâ præcisè factâ aliquo modo secun-
 “dum legem & consuetudinem regni *An-*
 “*glie* debet adnichillari, absque brevi de
 “attinctâ, &c.

The judgment in this case does not ap-
 pear, but it should seem, that the reason
 why the record of the verdict is said to be
 imperfect was not, because all the twelve
 did not agree, but because the *dicta utrius-*
que partis were not distinctly specified and
 recorded, which is declared to be the usage
 in such case, *prout moris est in tali casu.*

But

But it is held, that if a man be arraigned upon an indictment found by the grand inquest, and be acquitted, the jury shall not make such further inquiry. 14 H. 7. 2. b. 13 E. 4. 3. b. 37. H. 8. B. Coron. 117. 11 H. 4. 93. a. B. Coron. 32. 21 E. 3. 17. b. B. Coron. 39.

But surely the antient law was otherwise, and that the jury that acquits, whether upon a presentment, or upon an indictment of homicide, shall be chased to say, who did the fact. 37 Affiz. 13.

So if a man be indicted *de morte cujusdam ignoti*, the inquest shall be charged to tell the name, if they can. 2 E. 3. Coron. 159.

A man is indicted of robbery and acquitted, but it appeared to the court, that a robbery was done, but the prisoner *not guilty*, and therefore upon the statute of *Winchester* the court compelled the jury to present who did it, for the hundred is to answer for the bodies of the offenders, and the book concludes generally, *Et tiel course tiendra, ou home est indite de mort de home & acquit* 3 E. 3. Iter North. Coron. 307. so that they made no difference, where the [indictment was by the grand inquest, or by the coroner's inquest.]

The same law in a appeal 22 Affiz. 39. Coron. 178. 4 H. 7. Rot. 21. *Rastal's Entries* 57. a.

[301] But at this day the law and practice hath obtained, that only upon an arraignment upon the coroner's inquest the jury, if they acquit the prisoner, shall inquire who did the murder or manslaughter, and commonly it is a business of form, for they usually say, if it be not known, that *John a-Nokes* did it. 37 H. 8. B. Coron. 32. 21 E. 3. 17. b. B. Coron. 39. Dy. 238. b.

And as to indictments of robbery, if the petit jury acquit the prisoner, they do not inquire who did it, and the reason of the difference is, that for the most part in *Eyre* the petit jury were all of the same hundred, where the offense was committed, and then upon the statute of *Winton* the hundred were to answer *de corporibus malefactorum*, and therefore it was reason to put them upon the inquiry, who committed the robbery, if it appears to the court, that a robbery was committed, and the case of 3 E. 3. Coron. 307. was in *Eyre*, but now the jury, that tries, as well as inquires, is for the most part of the rest of the county, and therefore they answer only the point of *guilty* or *not guilty*: *vide Stamf. P. C.* 181. a.

The jurors of the petit inquest are charged to inquire if the party fled, and so of his goods and chattels, this is but an inquest of office, and traversable; *vide supra Part I. cap. 27. p. 362.* But it hath been held, that

that a presentment of flight before the coroner *super visum corporis* is conclusive to the party, and not traversable: *vide quæ supra dixi, Part I. cap. 31. p. 416, 417.*

And therefore it is, that if the coroner's inquest *super visum corporis* present a *fugam fecit*, and the party be taken and arraigned, and pleads to that indictment, the jury shall not be charged to inquire of the *fugam fecit*, because found before by the coroner's inquest, and if they be charged therewith and acquit the prisoner, and likewise say, that he did not fly, yet the record of the inquisition before the coroner finding the flight shall take place to intitle the king. 3 E. 3. *Forfeiture* 35. P. 7 *Eliz. Dy.* 238. b.

The jury may find a special verdict, or may find the defendant guilty of part, and not guilty of the rest, or may find the defendant guilty of the fact, but vary in the manner. [302]

If a man be indicted of burglary, *quod felonice & burglariter cepit & asportavit*, the jury may find him guilty of the simple felony, and acquit him of the burglary and the *burglariter*.

So if a man be indicted of robbery with putting the party in fear, the jury may find him guilty of the felony, but not guilty of the robbery.

The like where the indictment is *clàm & secretè à personâ*.

So if a man be indicted upon the statute of 1 Jac. of stabbing *contra formam statuti*, the jury may acquit him upon the statute, and find him guilty of manslaughter at common law. 23 Car. 1. *Harwood's case (d)*.

So if a man be indicted of stealing of goods of the value of 10s. the jury may find him guilty only of goods to the value of 6d. and so guilty only of petit larceny. 41 E. 3. *Coron.* 451. *Stamf. P. C. L.* III. cap. 9. fol. 165. a.

So if a man be indicted of murder *ex malitiâ præcogitatâ*, the jury may find him guilty of manslaughter. *Co. Lit.* 282. a. or that he killed him *se defendendo*, or *per infortunium*; but *nota* in these cases it is not sufficient generally to find it done *se defendendo*, or *per infortunium*, but the special matter must be set down how it was done, and if upon the special matter shewn it shall appear to be murder or manslaughter, the court will accordingly judge of it, tho the jury conclude, *Et sic per infortunium*, or *sic se defendendo*. 3 E. 3. *Coron.* 284, 286, 287, & 43. *Affiz.* 31. *Coron.* 226.

(d) *Style* 86.

And

And in these cases, tho it be found *per infortunium*, or *se defendendo* upon the special matter set forth, yet this special matter must be recorded, for tho it be not such a felony, as hath judgment of life, yet it is such an offense, as gives the forfeiture of goods, and therefore they may not find a general *not guilty*, but must find the special matter, and leave it to the court to judge.

[303] At the sessions at *Newgate* 16 *Car.* 2. upon the evidence it appeared, that *A.* a boy riding in the street upon an horse, *B.* another boy whipt the horse, the horse ran away against the will of *A.* and ran over a child and kild it, for this *A.* was indicted of murder by the grand inquest, and the jury found him generally *not guilty*; the court was in doubt of receiving the verdict, because it was *per infortunium*, and so ought specially to be found, but because the coroner's inquest had found the special matter, and concluded it, as in truth it was, *per infortunium*, which presentment *A.* was ready to confess, that so he might have his pardon of course, the verdict of *not guilty* was recorded, and so it was said was the usual course in that case; but it was agreed, that if *A.* had of his own accord put the horse into speed, and he had so kild the child, it had not been *per infortunium* but manslaughter. *Richard Pretty's* case for killing *Anne Jones*.

But now suppose the prisoner kild the party, but yet in such a way as makes no felony, as if he were of *non sane memory*, or if a man kills a thief, that comes to rob him, or to commit a burglary, or if an officer in his own defense kills one, that assaults him in the execution of his office, which are neither felony nor forfeiture, whether is it necessary to find the special matter, or may the party be found *not guilty*? *Foster* 265.

And I think, and so I have known it constantly practised, the party in these cases may be found *not guilty*, and the jury need not find the special matter.

And the reason is, that in these cases there is neither felony nor forfeiture.

And this is in effect declared by the statute of 24 *H.* 8. *cap.* 5. “ If
 “ any attempt to commit murder, robbery or burglary in or nigh
 “ any common high way, or in the mansion-house, &c. and the evil
 “ doer be slain, and if the same by verdict be found or tried, the
 “ slayer shall not lose any goods or chattels, but shall thereof be
 “ fully acquitted and discharged in like manner as he should be, if
 “ he

“ he were lawfully acquit of the death,” and accordingly ruled in *Cooper's case*. *P. 15 Car. B. R. Croke, p. 544.*

But it is used in such cases (and prudently enough), for the coroner's inquest to find the special matter, and the bill [304] of indictment of the grand jury to be for murder, and to have the party arraigned upon the bill of indictment, and to be acquitted thereupon upon trial, and to enter the acquittal upon the bill, and then to confess the coroner's presentment, and to have judgment also thereupon; thus it was done in the case of *Richardson* keeper of *Newgate*, who kild *Hyde*, that had committed a robbery and made resistance, that he could not be taken without being kild. *M. 25 Car. 2. at Newgate.*

And therefore, where a thief was kild in pursuit because of necessity, if the special matter be found, the killer shall have judgment, *quod eat sine die*. *22 Affiz. 55. Coron. 179. 22 E. 3. Coron. 258. 26 Affiz. 23. Coron. 192. 22 E. 3. Coron. 261.* and the reason is, because it is no felony, nor causeth any forfeiture so much as of goods, but is a justifiable act, and so differs from *se defendendo*, or *per infortunium*, which give a forfeiture of goods.

And since in an indictment or an appeal of felony the defendant cannot plead a justification, he shall have the advantage of it upon the general issue pleaded. *26 H. 8. 5. b. 37 H. 8. B. Appeals 122.*

Yet *vide 37 H. 6. 20 & 21. per Needham* upon an indictment of murder the defendant may plead, that in an appeal before the constable and marshal of treason he being appellee kild the appellant; yet in that case it seems, if he pleaded *not guilty*, he shall have advantage of that special justification upon evidence.

But [notwithstanding] this, that I have said, where the matter itself appears not to be felony, the prisoner upon *not guilty* pleaded may be found *not guilty*, without finding the special matter, and accordingly ruled. *P. 15 Car. 1. Croke, p. 544.*

Yet if the coroner's inquest find not the special matter but murder or manslaughter, and the prisoner is arraigned upon it and plead *not guilty*, and upon the evidence it appear, that the prisoner kild the man, but in such a manner as makes no felony, as a thief that assaults him upon the highway, or a thief that resists [305] the arrest, in this case the jury cannot find a general *not guilty*, but must find, that the prisoner did it, and the manner how, and this is to be entred of record, as in case of a verdict *se defendendo*.

And

And the reason of the difference is, because in the former case the jury gives a verdict of *not guilty* generally, without inquiring who did the fact. But where a man is arraigned upon the coroner's inquest *super visum corporis*, and pleads *not guilty*, if the jury acquit the prisoner by *not guilty*, yet they must inquire who did it, for here it is apparent there was a man slain, because the coroner takes the inquest upon view of the body, and if they should find him generally *not guilty*, and yet should upon their other inquiry find he kild him, it would be a contradiction in itself, and therefore in this case, they are to find the special matter, and thereupon the court shall give judgment for his discharge.

Many special verdicts have been found, as upon the statute of stabbing, so upon the point, whether murder or not, but it is difficult to find them so that judgment may be given for murder, because there are so many circumstances required to be found, that if any be omitted, the verdict will fall only to manslaughter.

I have rarely known upon any special verdict, where the question was murder or manslaughter, judgment to be given for murder (*d*), but commonly for manslaughter or *se defendendo*. *Tutius erratur ex parte mitiori.*

Burn. Tit. Jurors. sect. 5:

(*d*) There have been however several instances, wherein it has been done, viz. Mackally's case, 9 Co. Rep. 70. a. Mawgridge's case, Hill. 5 Ann. B. R. Kel. 120.

Oneby's case. Trin. 13 Geo. B. R. all which were special verdicts, and the court ruled them to be murder.

[306] C H A P. XLII.

Concerning the misdemeanors of jurors, and their punishment.

IF any of the jury eat or drink without license of the court before they have given up their verdict, they are fineable for it.

But tho it be not at the charges of either party, antiently it was held it would avoid the verdict. 24 E. 3. 24. a.

But at this day the law is settled, that it is only a misdemeanor fineable in them that do it, but avoids not the verdict. 14 H. 7. 29. b. (*a*). 20 H. 7. 3. a.

(*a*) *Vide pluis de eo case* 15 H. 7. 1. b.

But

But if it be at the charge, for the purpose, of the prisoner, and the verdict find him guilty, the verdict is good; but if they find him *not guilty*, and this appears by examination, the judge, before whom the verdict is so given, may record the special matter, and thereupon the verdict shall be set aside, and a new trial awarded. 14 H. 7. 30. a. b.

If a juryman before he be sworn take information of the case, this is cause of challenge, as the law stands at this day, but antiently it was held otherwise, and that it was lawful, and that was the reason given in the statute of 6 H. 6. cap. 2. which enacts, “ That pannels
“ of assises be deliverd by the sheriff to either party six days before
“ the sessions, namely, that they might inform the jurors of their right
“ before the session.

But this brought great inconvenience in embracery and tampering with jurors, and therefore it is justly disused and disapproved.

If a juryman have a piece of evidence in his pocket, and after the jury sworn and gone together he sheweth it to them, this is a misdemeanor fineable in the jury, but it avoids not the verdict, tho the case appears upon examination. M. 23 Car. 1. [307]

B. R. M. 40 & 41 Eliz. B. R. Croke, n. 1. Graves & Short (b);
vide tamen contra 11 H. 4. 18. a.

But if after the jury sworn either party deliver a piece of evidence to the jury, and the verdict is given for him that deliverd it, it shall avoid the verdict, but then this must appear by examination, and be indorsed upon the *postea* or verdict, so as it appears of record, and it must not be barely by affidavit made after. M. 40 & 41 Eliz. B. R. Graves & Short. Co. Lit. 227. b.

But if the verdict be given against him that deliverd the evidence, the verdict is good. *Ibid.*

If a piece of evidence under seal be read in court, the jury ought regularly to have it with them, but not if it be not under seal.

But yet if after the jury sworn a piece of evidence not under seal be by the court deliverd to the jury, it doth not avoid the verdict, and so it is, if it be deliverd by a mere stranger, or if it be deliverd by one of the parties, and the verdict be given against him, on whose behalf it was deliverd. M. 37 & 38 Eliz. B. R. Croke, n. 1. (c)

If after the jury sworn and gone from the bar they send for a witness to repeat his evidence, that he gave openly in court, who doth it

(b) Cro. Eliz. 616.

(c) Vicary & Farthing, Cro. Eliz. 411.

accordingly, this appearing by examination in court and indorsed upon the record or *postea* will avoid the verdict. *T. 32 Eliz. B. R. Croke, n. 17. Metcalfe & Deane (d). M. 20 Jac. B. R. Hillord & Hall (e)*, because not done openly in court, nor in the presence of the parties concerned. *M. 32 Eliz. B. R. Leon, n. 426. Elme's case (f)*.

But if the jury after their departure from the bar desire to hear the testimony of a witness again, they may be sent for into court, and the witness may be heard again openly, where the court or parties may ask what questions they think fit.

[308] If depositions are read in court to the jury, and after the jury sworn and going from the bar the solicitor or prosecutor for the king or party without consent of parties or order of the court deliver the copies of the depositions to the jury, if they find against him on whose part the copies were delivered, the verdict is good, but if they find for him on whose part they were delivered, and this appear by examination, and be (as it ought to be) indorsed upon the *postea* or record, the verdict shall be quashed, and a new *venire facias*, or award for a new jury shall be returned. *M. 20 Jac. B. R. Hillord and Hall.*

If after the evidence given, where divers evidences are read on both sides, and the clerk is making up his bundle of evidences, that were under seal, to deliver to the jury, the solicitor for the plaintiffs delivers a bundle of depositions to the jury, some whereof were read, and some not read, and upon examination this appeared, tho the jury swore they opened not the bundle delivered by the solicitor, yet the verdict for the plaintiff was for this cause avoided, (the matter being indorsed upon the record) and a new *venire facias* awarded, for great inconvenience may be by such a practice, and the oath of the jury, that never looked into them, was not regarded, for possibly it may be a misdemeanor in them to look into it, which they shall not excuse in this manner. *T. 1653. Webb & Taylor, 2 R. A. 714. pl. 6.*

If the party after the jury sworn speak with a jurymen, but nothing touching the business in issue, this doth not avoid the verdict given after for him. *M. 7. B. R. per curiam.*

But if he or any in his behalf say to a jurymen after his departure from the bar and before verdict given, the case is clear for the plain-

(d) *Cro. Eliz.* 189.

(e) *2 Rol. Rep.* 261. *Palm.* 325.

(f) *1 Leon.* 305.

tiff, this shall avoid the verdict, if given for the plaintiff, for it is new evidence. *H. 22 Jac. B. R. Athil & Bulwer* adjudged. 2 *Rol. Abr.* 716. *pl.* 20.

If *A.* be challenged off, and twelve more sworn, yet *A.* goes along with the twelve sworn and is present at their consultation, if *A.* give no new evidence, nor advised or directed them to find that party, for whom the verdict is given, the verdict is good, [309] but *A.* shall be fined for his misdemeanor. *P. 17 Jac. B. R. Park's* case.

Now touching fining of jurors I shall add farther.

If a man, that is one of the indictors, be returned upon the petit jury, and do not challenge himself, he shall be fined. 40 *Affiz.* 10.

If a jury say they are agreed, and it being asked, who shall say for them, they say their foreman, but upon farther inquiry they are not agreed, the jury shall be fined, *viz.* every one apart. 40 *Affiz.* 10. 29 *Affiz.* 27.

If a jurymen be called and refuse to appear, or if having appeared withdraw himself before he be sworn, the court may set a fine upon him at their discretion: *vide Stat. 35 H. 8. cap. 6.*

So if he be challenged, and while the challenge is trying withdraw himself, and the challenge is upon the trial disallowd, and he be not present to be sworn 36 *H. 6. 27. a.* or being sworn withdraw himself from his fellows before the verdict given. 34 *E. 3. Office de court* 12.

If eleven of the jury be agreed, and the twelfth refuse, and make his companions lie by it, heretofore such jurymen hath been imprisoned for his wilfulness, 8 *Affiz.* 35. and fined, and the inquest taken by the other eleven jurors. 3 *E. 3. Verdict* 40.

But upon great consideration both these courses have been disallowd, and the judgment upon the verdict of eleven jurors reversed, and the jurymen (fined and imprisoned) discharged, as being contrary to law, for it may be the twelfth was in the right, yet howsoever his conscience is not in this manner to be forced, and therefore former precedents of this kind have been disallowd. 41 *E. 3. 11. a.* 41 *Affiz.* 11.

But what if a juror give a verdict against all reason, convicting or acquitting a person indicted against evidence, what shall be done? I say, if the jury will convict a man against or without evidence, and against the direction or opinion of the court, the court hath this

salve to reprove the person convicted before judgment, and to acquaint the king, and certify for his pardon.

And as to an acquittal of a person against full evidence it is likewise certain the court may send them back again, and so in the former case, to consider better of it before they record the verdict, but if they are peremptory in it, and stand to their verdict, the court must take their verdict and record it, but may respite judgment upon the acquittal.

But as touching punishing the jury, I shall say, what I think may be done, and what may not be done.

1. I think in such a case the king may have an attain, for altho a man convicted upon an indictment can have no attain, because the guilt is affirmed by two inquests, the grand inquest, that presents the offense upon their oaths, and the petit jury, that agrees with them, yet where the petit jury acquits, they stand as a single verdict, for they disaffirm what the grand inquest of twelve men have upon their oaths presented, and with this agrees the book 10 *H. 4. Attaint* 60, 64. *per Thorn.*

2. By the statute of 26 *H. 8. cap. 4.* the justiciar or steward, before whom any person is acquit of felony against pregnant evidence in *Wales* or the marches thereof, may bind over the jurors to appear before the president and council of the marches of *Wales*, who may, as they see cause, fine and imprison such jurors by their discretion.

3. I do confess in the king's bench there have been many precedents of jurors, that have acquitted persons of murder, or other felony tried in that court, if they have gone against pregnant evidence, that have been fined, imprisoned and bound to their good behaviour during their lives (g).

The like hath been done before justices in *Eyre*, and the court of king's bench is a court in *Eyre* and much more, for that court may reverse judgment given in *Eyre*. See for this purpose *T. 43 Eliz. B. R. Rot. 979. Noy's Rep. p. 48 & 49. Wharton's case*, where the jury in the king's bench acquitting the prisoner of murder against pregnant evidence, and finding it only manslaughter were fined 20*l.*

[311] apiece, bound to the good behaviour and for the good behaviour of the prisoner, and committed, and this was done by the advice of all the judges. See the same case *M. 44 & 45 Eliz. B. R. Yelv. Rep. p. 23.*

(g) *Vide supra p. 159.*

M. 42 & 43 Eliz. B. R. Croke, n. 12. p. 778. Wats & Braines. In an appeal of murder there was a confederacy among the jury to bring in the verdict *not guilty*, and if the court disliked it, then to change their verdict, and accordingly they did, and the court disliking their verdict they went out and found him guilty, and this agreement being discovered, the principal confederates were fined and imprisoned, but this fine was for their confederacy and practice, not for their verdict.

7 *R. 2. Coron. 108.* The jury acquitted a notorious robber in the king's bench against great evidence, and the court bound the jury for the good behaviour of the prisoner; the reporter makes a *quære per quel ley*, vide the notes annexed to *Benloe 153.* to the same purpose.

4. Again, in cases of inquest of office there have been precedents in the *Exchequer*, and more frequent in the court of wards for fining of jurors, that would not find according to their evidence. *H. 28 Eliz. in Scaccario coram Thess. & baronibus. 3 Hughes 196.*

5. The practice of the king's bench to fine jurors for finding verdicts contrary to their evidence was endeavouring to be brought in practice before judges of *nisi prius*; and about 14 *Car. 2.* in an *Oxfordshire* case *Huntingdon* and his eleven companions jurors were fined 5*l.* apiece for such a verdict, and the fine estreated into the *Exchequer*, but by the whole court by the advice of the greater part of the rest of the judges process was stayed upon that estreat, as being imposed contrary to law (*h*).

6. Before justices of *oyer and terminer* and gaol-delivery, if the jury acquitted a felon contrary to their evidence, the use was to bind them over to appear in the king's bench to answer an information, but I never knew any preferd, and indeed it were impossible almost for any judge or jury to convict a jury upon such an account, because impossible, that all the circumstances of the case, that might move the jury to acquit a prisoner, could be brought in evidence; this therefore seems to me to be but *in terrorem*. [312]

7. But then it was endeavoured to bring the practice of the king's bench into use before justices of gaol-delivery and *oyer and terminer* to fine jurors in criminal causes for not observing the judges directions, and acquitting felons against their evidence, and accordingly a jury in *Gloucestershire* was fined 5*l.* a man for acquitting a person in-

(b) *Vide antea cap. 22. p. 160. Vaugh. 145.*

dicted of burglary, the form of the fine was much the same as is hereafter mentiond, this fine was also estreated into the *Exchequer*, but all the court after great advice with the judges of the common pleas orderd a stay of process thereupon, as being neither warrantable by law nor antient precedents in any court less than *Eyre*.

At the gaol-delivery at *Newgate* 10 *Maii* 17 *Car.* 2. *Wagstaff* (i) and eleven other jurymen were fined five marks apiece for acquitting *Richard Tomson* and others indicted for conventicles, *Eo quòd ipsi juratores adtunc & ibidem eosdem Ricardum Tomson &c. de prædictâ transgressione & contemptu contra regem hujus regni Angliæ, & contra plenam evidentiam, & contra directionem curiæ in materiâ legis ibidem de & super præmissis eisdem juratoribus versùs præfatos Ricardum Tomson &c. in dictâ curiâ ibidem apertè dat' & declarat' de præmissis eis impositis in indictmento prædicto acquieverunt in contemptum dicti domini regis nunc legumque suarum, & ad magnam obstructionem & impedimentum justitiæ, necnon in malum exemplum omnium aliorum juratorum in consimili casu delinquentium.*

They were thereupon committed, and brought their *habeas corpus* in the court of common-bench, and all the judges of *England* were assembled to consider of the legality of this fine, and the imprisonment thereupon, wherein there was some little diversity of opinion, whether without a cause of suit returned also, the common pleas could give judgment touching this fine, and if there were cause, deliver the party, or whether he must go into the king's bench by *habeas corpus* and *certiorari*.

[313] But it was agreed by all the judges of *England*, (one only dissenting,) that this fine was not legally set upon the jury, for they are the judges of matters of fact, and altho it was inserted in the fine, that it was *contra directionem curiæ in materiâ legis*, this mended not the matter, for it was impossible any matter of law could come in question, till the matter of fact were settled and stated and agreed by the jury, and of such matter of fact they were the only competent judges.

And altho the witnesses might perchance swear the fact to the satisfaction of the court, yet the jury are judges as well of the credibility of the witnesses, as of the truth of the fact, for possibly they might know somewhat of their own knowledge, that what was sworn

(i) In *Busbell's case*, *Vaugb.* 153.

was untrue, and possibly they might know the witnesses to be such as they could not believe, and it is the conscience of the jury, that must pronounce the prisoner *guilty* or *not guilty*.

And to say the truth, it were the most unhappy case that could be to the judge, if he at his peril must take upon him the guilt or innocence of the prisoner, and if the judge's opinion must rule the matter of fact, the trial by jury would be useless.

Whereupon, and upon view of the precedents in the court of common bench, where prisoners not legally committed or fined had been discharged, tho no cause of privilege were returned, the jurors were discharged of their imprisonment.

And therefore, altho the long use of fining jurors in the king's bench in criminal causes may give possibly a jurisdiction to fine in these cases, yet it can by no means be extended to other courts of sessions of gaol-delivery, *oyer* and *terminer*, or of the peace, or other inferior jurisdictions.

3 Wilton, 172, 177.

C H A P. XLIII. [314]

Concerning standing mute, and the punishment of penance, or peine fort & dure. []*

I HAVE hitherto considered the pleas of the prisoner in capital causes, namely, 1. Confession. 2. Pleas in bar, and 3. Pleas to the felony, or *not guilty*.

And I have considered the proceedings in order to bring the party to his trial, and the trial thereupon by the jury.

It remains, that I should now come to consider what is to be done in case the prisoner will not answer, but stand mute and make no defense.

[*] But now by the statute 12 Geo. 3. c. 30. If any person being arraigned on any indictment or appeal of felony, or on any indictment for piracy, shall upon such arraignment stand mute, or will not answer directly to the felony or piracy, he shall be convicted of the offense, and the court shall thereupon award judgment and execution, in the same manner as if he had

been convicted by verdict or confession; and such judgment shall have all the same consequences, as a conviction by verdict or confession.

And the same law is, with respect to an arraignment for treason or petty larceny. See *Burn. Tit. Mute. 2 Inst. 177. 2 Harok. P. C. 329:*

In this matter these things are considerable.

1. What shall be said in law a *standing mute*, and what not.
 2. What the consequence or penalty is of a standing mute in capital causes, and therein of *peine fort* and *dure*.
 3. What cautions are to be used before the inflicting of it.
 4. By what law it is introduced.
- I. As to the first of these.

If the prisoner hath received his judgement already, or be convicted and brought to the bar, and demanded what he can say, why judgement should not be given against him, if convicted, or why execution should not be awarded, and he saith nothing, yet this is not such a standing mute as is in hand, for he is already convict or attaint: And therefore in such case, if the party so called hath always remained in custody from the time of his plea of *not guilty*, if he be called to shew what he can say, why he should not have judgment [315] upon his conviction or execution upon his former judgment, and he say nothing, it shall not be inquired, whether he can speak or not, but he shall not have present judgment or execution, as the case requires. 10 E. 4. 19. b. But if long time hath passed between his conviction or judgment and this second calling to the bar, it is prudent to make the inquiry, at least by witnesses, whether he can speak, for possibly he may have a pardon to plead.

But if a man abjure or be outlawd of felony, and after return again, and be taken and brought to the bar to shew cause why execution should not be done, if he stand mute, an inquest of office is to be taken by the court to inquire, whether he can speak or not, and if it be found, that by visitation of God since his abjuration, &c. he hath lost his speech, it shall be also inquired, whether it be the same person containd in the record of outlawry or abjuration, before judgment or execution (as the case requires), shall be awarded against him, for he may plead in bar of execution in such case, that he is not the same person. 10 E. 4. 19. b. 8 H. 4. 1. b. And so it seems to be, if he were brought in upon a *capias utlegat'* or *habeas corpus* by the sheriff; *de quo infra*.

And therefore the book of 26 Affiz. 19. that saith a party abjured standing mute shall have *peine fort & dure* is mistaken, for he shall be hanged, if he stand mute of malice. *Stamf. P. C. Lib. II. cap. 60. fol. 150. b.*

If

If a man indicted of felony demur to the indictment, and will not otherwise answer, this is no standing mute, but if the demurrer be ruled against him, he shall have judgment of death. 14 E. 4. 7. a. *per cur.*

If a man indicted or appeal'd of felony pleads *not guilty*, and puts himself upon the country, and the jury remains upon challenges till another day and then appears, and the prisoner at the bar will say nothing but stand mute, yet this is not a standing mute, for the inquest shall be taken upon the issue already joined; and so in an appeal. 15 E. 4. 33. b.

And yet even in that case it is possible the prisoner may be taken dumb between his plea and his trial, and so lose some advantages, that the law gives him for his defense, as challenges, [316] examination of witnesses and many matters for his defense; [therefore] the court hath used sometimes by inquest, sometimes by inquiry *ex officio* by the inquest impannelled to try his issue to inquire, whether he stand mute of malice, and then to try him, or if it be *ex visitatione Dei*, then to respite his trial, but if he spoke the same day in the hearing of the court, then such inquest of office is not taken, for the court is of their own knowledge ascertained of his ability to speak. 43 Affiz. 30. 8 H. 4. 1 & 2.

The standing mute of a prisoner is not, where he hath pleaded *not guilty* and put himself upon the country, tho afterwards he would retract it.

If a prisoner for felony plead *not guilty* and put himself upon the country, and when the jury appears he challengeth peremptorily above thirty-five, in such case the jury was not to be taken, but judgment of penance was antiently given against him, and so it was no attainder in case of felony. 17 Affiz. 6. 17 E. 3. 23. a. 14 E. 4. 7. a. 3 H. 7. 12. a. 2. a.

But the law herein was after declared otherwise, and by the advice of all the judges judgment of death shall be given, and so it was an attainder. 3 H. 7. 12. a. where it was settled for a rule in all circuits, and so it continued until 22 H. 8. cap. 14. when by act of parliament the challenge was reduced to twenty, and so the judgment of death upon peremptory challenge ceased, unless in high treason or petit treason, where it stands on foot as before, *vide Co. P. C. cap. 102. p. 227, 228.* who seems to hold, that for challenging above thirty-

thirty-five judgment of *peine fort & dure* shall be given according to 14 E. 4. 7. a. & 3 H. 7. 2. a. *per omnes justiciarios contra Keble.*

Regularly therefore a man is said to stand mute, when being arraigned for felony or treason, either 1. He answers not at all, or 2. If he answers with such matter, as is not allowable for answer, and will not answer otherwise, or 3. Where he pleads *not guilty*, but when demanded how he will be tried, either will say nothing, or not put himself upon the country.

[317] If he stand mute and say nothing at all, in case of felony the court ought *ex officio* to impanel a jury and swear it as an inquest of office to inquire, whether he stand mute of malice, and if found so, he shall have the judgment of *peine fort & dure*, or whether it be *ex visitatione Dei*, and if found so, they are to inquire touching all those points, which he might possibly plead for himself, as whether a felony were done, whether he be the same person, that is indicted for it, whether he did it, and whether he hath any matter to alledge for his discharge.

But what if all this be found against the prisoner, what shall be done? whether judgment of death shall be given against him, tho he never pleaded, seems yet undetermined (a).

If a man plead *not guilty*, and being demanded how he will be tried answers by God and holy church 4 E. 4. 11. a. or delivers in a protection 7 E. 4. 29. a. *Coron.* 30. or will not put himself upon trial of his country, this is a standing mute, as much as if he had not at all pleaded.

II. As to the consequences of standing mute.

In case of an indictment of high treason, the party standing mute, judgment of high treason shall be given against him as upon a *nihil dicit*, M. 3 & 4 Eliz. Dy. 205. a. *rule accordant.* *Stamf. P. C. Lib. II. cap. 60. fol. 150. a. 2 Co. Inst. super stat' Westm' 1 cap. 12. vide infra, cap. 44.*

In an appeal antiently it had been held, that if the prisoner stands mute, judgment should be given for the appellant. 21 E. 3. 18. a. (*).

But afterwards the law was held all one in case of an appeal and of an indictment, namely the defendant standing mute judgment of *peine fort & dure* was given against him, and the statute of *Westm' 1. cap.*

(a) *Vide B. Corone* 217. where a person, who could neither speak nor hear, was arraigned for felony; *vide Part I. p. 34. in notis.*

(*) See *State Tr. Vol. I. p. 367.* lord Audley's case.

12. speaks only of the king's suit, (†) *vide* 43 *Affiz.* 30. 3 *H.* 7. 2. *a.* 14 *E.* 4. 7. *a.*

If a man be indicted of felony and stands mute, he shall be put to penance, *T.* 18 *E.* 2. *B. R. Rot.* 20. *in dorso*, *Berks, rex* (b). [318]
And yet *vide* *H.* 18 *E.* 3. *B. R. Rot.* 16. *Ebor. rex, Petrus Geildhird* arraigned (c) *pro deprædatione in regiâ viâ* stood mute, and an inquest of office being charged to inquire, if it were wilful, and found so, he had judgment to be hanged.

On the other side *T.* 30 *E.* 3 *Rot.* 11. *in dorso* *Hunt. rex*, The bishop of *Ely* arraigned for felony *dicit, quòd ipse est membrum sanctæ ecclesiæ, & episcopus unctus, & frater domini Papæ*, and that he could not answer without the archbishop of *Canterbury* [his ordinary] *coram laico iudice*; there went out thereupon a writ to the sheriff of *Hunt.* to return twenty-four to inquire of the whole fact, and by the inquest he was found guilty of the felony charged upon him, [*de receptamento felonum*] and his goods seised, but he was demanded by the archbishop of *Cant.* and delivered to him as a member of holy church, so that there the fact was inquired of, tho the bishop refused to answer, which was a kind of standing mute (d).

By the statute of 33 *H.* 8. *cap.* 12. any person arraigned before the lord steward for treason, murder, manslaughter, or blood-shed in the king's palace, and standing mute shall have judgment, as if convicted so there is no penance in that case.

But upon the statute of 28 *H.* 8. *cap.* 15. for commissioners of the admiralty proceeding in maritime felonies, &c. there is no such exclusive provision, and therefore they follow herein the [319]

(†) 2 *Co. Inst.* 178.

(b) This was the case of *Stephen le Ferroux*, who was indicted before justices of eyer and terminer *pro receptamento felonum*, and upon being arraigned *mutum se tenuit*, a jury was impannelled *ex officio*, who found *quòd mutum se tenet de mera & spontanea voluntate sua, & quòd loqui potest si velit*, and he was thereupon put to penance, *ad penam*; the record was removed by writ of error *coram rege*, where he pleaded *not guilty*, and was committed to the marshall and afterwards produced the king's pardon, *Ideo inde quietus*.

(c) It appears by the record, that it was not upon arraignment, that he stood mute, for he had fled from justice and was outlawed, but being afterwards taken he was brought into court, and demanded why execution should not be done upon him in

pursuance of the outlawry, to this he made no answer; but this is not a standing mute to the purpose in hand, as our author himself hath shewn at the beginning of this chapter.

(d) This was not properly a standing mute, but a claiming the benefit of clergy, (which in antient times was usually done before pleading,) and was of the like nature with the case of *Alan de Beckingham* *Mich.* 20 & 21 *Edw.* 1 *Rot.* 4. *in dorso coram rege, Nottingham*, see *Part I.* p. 343. *in notis.* and the case of *John de Bosco*, *P.* 6 *E.* 2. *B. R. Rot.* 2. *Essex*, see *Part I.* p. 180. *in notis*, the reason therefore, why the fact was inquired of, was the same in this case, as in those, *viz.* that it might be known *pro quali ordinario liberari debeat*, whether as a clerk convict or acquit. *Vide* 2 *Co. Inst.* p. 633.

course of the common law, so that any person indicted for piracy before these commissioners standing mute shall have judgment of *peine fort & dure*. *T. 7. Eliz. Dy. 241. b. Brooke's case.*

The judgment of *peine fort & dure* is, as it is recited by *Stamf. P. C. Lib. II. cap. 60. fol. 150. b. & 4 E. 4. 11 b. viz.* “That he be
“sent to the prison from whence he came, and put into a dark, lower
“room, and there to be laid naked upon the bare ground upon his
“back without any clothes or rushes under him or to cover him except
“his privy members, his legs and arms drawn and extended with cords
“to the four corners of the room, and upon his body laid as great a
“weight of iron, as he can bear, and more. And the first day he
“shall have three morsels of barley bread without drink, the second
“day he shall have three draughts of water, of standing water next
“the door of the prison, without bread, and this to be his diet till he
“die” (*e*). *Vide the entry thereof Rast. Entries 385. a.*

This judgment is given for his contempt in refusing his legal trial, and therefore he thereby forfeits his goods, but it is no attainder, nor gives any escheat or corruption of blood. *vide 34 E. 3. Escheat 10. Dy. 308. a. 14 E. 4. 7. a.*

The severity of the judgment is to bring men to put themselves upon their legal trial, and tho sometimes it hath been given and executed, yet for the most part men bethink themselves and plead.

If a peer of the realm arraigned upon an indictment of felony before his peers refuses to plead, [he shall have] this judgment of *peine fort & dure*. *P. 17 Car. 1. casus domini Castlehaven. (f).*

And a woman shall have the same judgment if she stands mute. *2 Co. Inst. 177. super stat. Westm' 1. cap. 12. Wiseman's case there cited.*

[320] If a man be indicted of petit larceny and refuses to plead, it seems judgment of *peine fort & dure* shall not be given, but the party convict, for he is not to have judgment of death.

But if a woman be indicted for simple larceny of goods under 10s. tho she shall not die for it, but only be burnt in the hand by the statute of *21 Jac. cap. 6.* yet if she refuses to plead, the judgment of *peine fort & dure* shall be given against her, because it may fall out upon the case, that she hath been burnt in the hand before, and then she is to be executed; and it is but a privilege, as clergy is, which she must put herself by her defense into a capacity of enjoying.

(*e*) But before they proceed to this extremity, it has been the practice to endeavour to make the prisoner plead by tying

his thumbs together with whip cord, *Thorely's case Kel. 27.*

(*f*) *State Tr. Vol. I. p. 367.*

If a new felony be made by act of parliament, tho it makes no provision touching the penalty of standing mute, yet it is a necessary consequence thereof, tho not specially provided for, if it be not ousted by the act, that makes it felony; as clergy is an incident to every new created felony, unless specially ousted by act of parliament (*), for they are incidents: *vide Dy. 241. b.*

And therefore in rape, tho made felony by *Westm' 2. cap. 34.* if the party indicted stand mute, he shall have judgment of penance. *P. 7 Car. 1. lord Castlehaven's case.*

Tho judgment be given of *peine fort & dure*, yet if the offense laid in the indictment be within clergy, his clergy shall be allowed him, which appears by the statutes of 23 *H. 8. cap. 1.* 25 *H. 8. cap. 3.* and other statutes that oust clergy, where the party stands mute, in some particular cases, and by the books.

III. As for the third general, the necessary cautions to be used in inflicting this severe punishment are these.

1. Let not the judgment be too hastily given, let the prisoner have not only *trina admonitio*, but also some convenient respite, possibly till the afternoon, to bethink himself, if the arraignment be in the morning; or till the next morning, if the arraignment be in the afternoon: and let the judgment itself be distinctly read to him, that he may know his danger before his final refusal with due admonition [321] not to destroy himself. 4 *E. 4. 11. b.*

2. Before any judgment final be given, if the prisoner stands wholly mute and says nothing at all, let an inquest of office be taken to inquire, whether it be *ex malitiâ*, or *ex visitatione Dei*, unless he hath spoken in court the same day, *vide Rast. Entries title gaol-delivery.*

3. And likewise let the judge hear the witnesses upon oath to give a probable testimony of his guilt, for tho his malicious silence carries with it a presumption of guilt, yet it is good to have some concurrent testimony. 1. In respect of the severity of the judgment. 2. Because the statute of *Westm' 1. cap. 12. de quo infra*, seems to require it.

4. If the offense laid in the indictment be within clergy, tho in strictness of law the prisoner ought to pray it, yet it is the duty of the judge to allow it, tho not prayed, and that as well after judgment pronounced as before.

IV. Concerning the fourth particular, by what law this judgment of *peine fort & dure* is introduced.

(*) *Vide Part I. p. 704.*

By the statute of *Westm' 1. cap. 12.* *Purvieu est ensement que les felons escries, & queux sont apertement de male fame, & ne soy voilent mitter en enquest de felonies, que homes met sur eux devant justices a la suit le roy soient mises en la prison fort & dure, come ceux queux refusent estre al common ley de la terre, mes ceo nest my a entendre pur prisoners, que sont prises per legier suspicion.*

Some (*h*) have antiently thought, that this act of parliament introduced the penance, and therefore they did antiently think it did not extend to an appeal, because that is the suit of the party and not the suit of the king, *de quo antea p. 317.*

But it seems, that altho this statute is in some points directive, namely, that it should be applied to those, that are of ill fame, and not those, who are taken upon a light suspicion, and therefore the court before they give this judgment ought either by inquest of office, or at least by examination of witnesses to inquire concerning the pro-

[322] babilities of the guilt: *vide Stamf. P. C. Lib. II. cap. 60. fol. 150. a.* yet this statute doth not originally introduce the penance, but it was to be done by the common law, and accordingly it is agreed by my lord *Coke* in his comment upon this statute 2 *Inst. p. 179.*

And this appears 1. Because this statute only speaks of imprisonment *fort & dure*, but enacts not the punishment itself by this lingering painful death, therefore the punishment, as it is thus inflicted, was at common law, and is by force of the common law. 2. Because tho some antient opinions were, that it extended not to the case of an appeal of felony, yet the law hath constantly for many ages extended it to an appeal (*i*), which cannot be by force of this statute, but by the common law.

3. The antients, as *Fleta* (*k*), *Britton* (*l*) and *Horn* (*m*), tho they wrote since the making of this statute, mention the penance without referring of it to this act of *Westm' 1. (n)*.

C H A P.

(*b*) *Stamf. P. C. 149. b. Poulton de pace regis 211. b.*

(*i*) *Kel. 371*

(*k*) *Lib. I. cap. 34. § 33.*

(*l*) *Cap. 4. § 23. & cap. 22. § 73.*

(*m*) *Mirror, cap. 1. § 9.*

(*n*) This statute was made 3 *E. 1.* and tho by the manner of the expression it does not seem to have introduced this penance, but rather speaks of it as a thing already known, yet I cannot find, that it is ever

taken notice of in any antient author, book, case, or record before the reign of *E. 1.* on the contrary I find some instances in the preceding reign of persons arraigned for felony standing mute, who yet were not put to their penance, but had judgment to be hanged: at which time it seems to have been the usual practice, that if the prisoner stood wilfully mute, a jury of twelve were impannelled *ex officio*, and if they found him guilty, another jury of twenty

C H A P. XLIV.

Concerning clergy how it stood at common law, and how generally at this day.

HAVING in the former chapter gone through the pleas and trials of the prisoners, and the proceeding upon standing mute, I come to consider the *privilegium clericale*, and I the rather refer it to be examined in this place, because tho antiently clergy was prayed and allowed upon the arraignment of the prisoner, yet at this day it is rarely done but upon his conviction or standing mute, and this is, 1. For the convenience of the court to be ascertained first of the nature of the crime by the confession or trial of the prisoner. 2. For the advantage of the prisoner, who possibly may be acquitted, and so need not the benefit of clergy: *vide Hob. Rep. 288. Searle & Williams.*

And for the full discussion of this matter, (which I must needs say is one of the most involved and troublesome titles in the law,) I shall, as near as I can, hold this method. 1. To consider somewhat in general touching the original and alteration of the privilege of clergy. 2. In what cases it is to be allowed, and in what not (*a*). 3. What persons are capable of this privilege, and what not (*b*). 4. At what time it is to be allowed, and when not (*c*). 5. The manner how it is to be allowed, and who the judge of it (*d*). 6. The consequence of the praying or allowing of it (*e*).

twenty-four were chosen to examine the verdict of the former; and if they were of the same opinion, the prisoner was sentenced to be hanged. *Placita coronæ coram justic' itinerant' in comitatū Warwicensi anno 5 H. 3. Rot. 1.*

“*Agnes, quæ fuit uxor Roberti de Bosco, appellat Thomam filium Huberti de morte Roberti viri sui, & Thomas venit, & quia ipsa habet virum Robertum de Verdun nomine, qui nullum facit appellum, ipsa non habet vocem appellandi, & ideo inquiratur veritas per patriam, & Thomas defendit mortem, sed non vult ponere se super patriam, & xii juratores dicunt, quod culpabilis est de morte illâ, & xxiv milites, alii a prædictis xii, ad hoc electi idem dicunt, & ideo suspendatur.*

Catalla Thomæ xxxiv. solidos & vi denarios, unde vicecomes respondebit.

Ibidem in dorso. “Thomas de la Herbe captus per indictmentum pro furtis & aliis nequitiiis & pro receptamento venit, & non vult ponere se super patriam; & juratores dicunt super sacramentum suum, quod malè credunt eum de receptamento Holbæ Golightly, qui fuit latro cognitus, & postea suspensus apud Caunped'em, & de hoc & de aliis furtis eum malè credunt, & xxiv milites ad hoc electi dicunt idem, quod prædicti xii juratores, & quod latro est de ovibus & de averiis & aliis rebus, & ideo suspendatur.

(*a*) *Cap. 45. 46, 47, 48, 49, 50.*

(*b*) *Cap. 51.*

(*c*) *Cap. 52.*

(*d*) *Cap. 53.*

(*e*) *Cap. 54.*

For

For the first of these, namely the original and progress of this *privilegium clericale*.

Antiently princes and states converted to christianity in favour of the clergy, and for their encouragement in their offices and employments, and that they might not be so much intangled in suits, did grant to the clergy very bountiful privileges and exemptions, principally of two
 [324] kinds. 1. Exemption of places consecrated to religious duties from arrests of crimes, which was the original of sanctuaries. 2. Exemption of their persons from criminal proceedings in some cases capital before secular judges, which was the true original of the *privilegium clericale*.

The clergy increasing in wealth, power, honour, number and interest, afterwards set up for themselves, and that, which they obtained by the favour of princes and states at first, they now began to claim as their right, and a right of the highest nature, namely *jure divino*; and by their canons and constitutions endeavoured, and (where they met with tame and easy princes and states,) obtained vast extensions of these exemptions. 1. In the person concerned, namely to all that had any kind of subordinate ministration relative to the church. 2. In the causes, exempting as far as they could all causes of clergymen, as well civil as criminal, from the jurisdiction of the secular power, and wholly subordinating them immediately and only to the ecclesiastical jurisdiction, which they supposed to be lodged first in the pope by divine right and investiture from *Christ*, and from the pope shed abroad into all subordinate and ecclesiastical jurisdictions, whether ordinary or delegate.

And by this means they endeavoured and in some kingdoms and for some ages obtained, that there was a double supreme power, or two kingdoms in every kingdom, the one a *regnum ecclesiasticum*, absolute and independant upon any but the pope over ecclesiastical men and causes, exempt and separate from the secular magistrature; the other a *regnum seculare* of the king or civil magistrate, which yet was not so absolute, but that it had subordination and subjection to this *regnum ecclesiasticum*; so it was *regnum sub graviore regno*.

He that lists to see the whole scheme of their claim, let him read *Suarez* his large discourse of the *monumenta ecclesiastica* in his *opuscula*.

But altho the usurpations of the pope were very great and obtained much in this kingdom, until the extermination of his pretended supremacy by king *H. 8.* yet this claim of the exemption of the clergy
 totally

totally from secular jurisdiction grew so burdensome and intolerable, that it was from time to time qualified and abridged by the civil power, sometimes by acts of parliament taking it away in some cases, sometimes by the interpretation and construction of the judges, and sometimes by the contray usage of the kingdom; for ecclesiastical canons never bound in *England* farther than they were received, and so had not their authority from their own strength and obligation, but from the usages and customs of the kingdom that admitted them, and only so far forth as they were so admitted. And therefore,

I. As to the exemption of the clergy from civil suits between party and party only, if upon the *disfringas* he was returned *clericus & beneficiatus non habens laicum feodum*, process issued to the bishop to bring him in, and in case of a statute merchant they were by special acts exempted from arreſts by *capias*. But yet they were not exempt from the jurisdiction of civil courts in civil causes, yet antiently they attempted this also in the king's courts but with ill success, and so they never attempted it after, that I remember.

M. 7 & 8 E. 1. B. R. Rot. 13. Cant. William Joye plaintiff [brought an action] against *Guy Mortimer* rector of *Kingston* for beating him and cutting off his upper lip with a knife, the defendant pleaded *quod ipse est clericus, & non debet hic respondere*, and that was all the answer he would give, *Et quia querela ista non tangit vitam & membrum, sed est de quâdam transgressione personali, nec ipse vult in curiâ domini regis respondere ad querelam istam*, judgment was given for the plaintiff to recover 100*l.* damages taxed by the court, and [the defendant was] committed to gaol, and afterwards paid twenty marks to the king for a fine (o).

II. If they were indicted in cases criminal but not capital, nor wherein they were to lose life or limb, there *privilegium clericale* was

(o) The record of that case was thus,
 “ *Willielmus Joye de Kyngeston* queritur de
 “ *Guydone de mortuo mari*, rectore ecclesiæ
 “ de *Kyngeston*, & *Thomâ le Clerk* de *Ha-*
 “ *rengton* de hoc, quod *Thomas* simul cum
 “ aliis ex præcepto prædicti *Guydonis* ip-
 “ sum *Willielmum* insultaverunt, verbera-
 “ verunt, & male tractaverunt, ita quod
 “ de vitâ ipsius desperabatur; & dictus
 “ *Guydo* manû suâ propriâ, & knypulo suo
 “ labium ipsius *Willielmi* superius abscidit,
 “ unde dicit quod deterioratus est & damp-
 “ num habet ad valentiam centum libra-
 “ rum; & inde producit sectam. Et præ-
 “ dicti *Guydo* & *Thomas* veniunt & dicunt,
 “ quod clerici sunt, & non debent hic re-

“ spondere, & sæpius quæſiti si velint re-
 “ spondere, semper dicunt quod clerici
 “ sunt, & sine ordinariis suis nolunt re-
 “ spondere. Et quia querela ista non tan-
 “ git vitam & membrum, sed est de quâ-
 “ dam transgressione personali, nec ipsi
 “ volunt in curiâ domini regis respondere
 “ ad querelam illam, consideratum est,
 “ quod prædicti *Guydo* & *Thomas* de præ-
 “ dictâ transgressione convincantur, & sa-
 “ tisfaciant prædicto *Willielmo Joye* de
 “ dampnis, scilicet quilibet eorum de cen-
 “ tum libris, & domino regi de miseri-
 “ cordiâ, & committantur gaolæ pro
 “ transgressione &c.

not allowd them, and therefore not in indictments of trespass, petty larciny, or killing *se defendendo*. *Stamf. P. C. fol. 124. a.*

III. If they were not indicted of high treason, clergy was not allowable, and therefore *Hill. 2 H. 4. Rot. 4. B. R. rex*, where the bishop of *Carlisle* was indicted of high treason, and insisted upon his *privilegium clericale, quia episcopus unctus*, yet this claim was disallowd and he put upon his trial, and convicted (*p*).

Yet *Hill. 17 E. 2. Rot. 87. in dorso, Heref. coram rege*, the bishop of *Hereford* indicted of high treason for levying war against the king alleged, that he was *episcopus Heref. ad voluntatem Dei & summi pontificis*, and could not answer *absque offensâ divinâ & sanctæ ecclesiæ*. Thereupon the plea was adjourned into parliament, where the bishop answered as before, and the archbishop of *Canterbury* claimed him and had him; thereupon it was ordered, that day should be given in the king's bench to the bishop, and the archbishop was to have him there at the day, and in the mean time a writ issued to the sheriff of *Heref.* to return twenty-four to inquire, as if he had pleaded, [*quod venire faciat tot & tales, &c. ad inquirendum prout moris est, &c. pro quali, &c.*] returnable at the same day; the bishop appeared accord-

[327] ingly in the custody of the archbishop, and the jury found him guilty, *Ideo considerat' est, quod prædictus episcopus tanquam convictus &c. remaneat penes prædictum archiepiscopum ut prius, &c.* and all his goods and chattels, lands and tenements were seized into the king's hands by writ directed to the sheriff: Upon which it is observable, 1. That a kind of allowance is made of clergy in high treason. 2. That notwithstanding his claim of clergy, yet a writ issued to summon a jury, who inquired whether guilty or not. 3. That upon this plea and this inquisition, tho he had his clergy, it was *ut clericus convictus*.

Nota in the parliament of the 1 *E. 3.* this judgment was reversed for this cause, that the justices took the inquisition, *licet idem episcopus in aliquam inquisitionem se non posuisset*. *Claus. 1 E. 3. Part I. M. 13.* so that the judgment was given upon the inquisi-

(*p*) The treason given in the record is in these words, "Quicumque liges domini regis, cujuscunque status, seu conditionis, spiritualis, vel temporalis fuerit, in terrâ *Angliæ* pro altâ prodicione & crimine læsæ majestatis indictatus est, & coram rege, vel justiciariis suis inde arrenatus tenetur, & debet per legem

Angliæ inde respondere.

Yet in antient times a difference was made between treasons, that were immediately against the king's person, and other treasons; *vide Part I. p. 185, 186. 222. in notis*; and the case of the bishop of *Hereford* here mentiond.

tion,

tion, and not upon *nihil dicit* for standing mute, and therefore erroneous (*q*).

But afterwards *T. 21 E. 3. Rot. 23. Hertford, rex, John Gerberge*, was indicted for a constructive treason namely, accroaching royal power, *de quo vide supra, Part I. cap. 11. p. 80. 138.* and thereupon claimed the privilege of clergy, *Et quia privilegium clericale in hujusmodi casu seditionis secundum legem & consuetudinem regni hæcenus obtentas & usitatas non est allocandum &c. quæsitum est ab eo sepius qualiter se velit acquietare*, he still replied, that he was a clerk, *asserens se nolle aliam responsionem exhibere*; and thereupon he [328] is committed to the marshal *ad pœnitentiam suam secundum legem & consuetudinem regni subiturum &c.*

Nota clergy denied in such a treason, yet penance awarded, tho the charge was treason.

Yet at common law before the statute of *25 E. 3. cap. 4. pro clero*, it seems that clergy was allowable to him that was indicted for counterfeiting coin, or for counterfeiting money. *B. Clergy 1.* But that is altered by the statute of *25 E. 3. pro clero*.

IV. If clerks were indicted with these clauses *insidiatores viarum & depopulatores agrorum*, clergy was denied them, and therefore the act of *4 H. 4. cap. 2.* was made to put these clauses out of indictments and to allow clergy, if they were in the indictment.

Again, as it was denied in respect of some offenses, so this *privilegium clericale* was by the common law abridged in respect of the person; for certainly by the canon laws Nuns had the exemption from

(*q*) The error of this judgment consisted not merely in its being given upon an inquisition "in quam episcopus se non posuisset," but because it was given upon an inquest, "in quam episcopus se non posuisset," after he had been allowed his clergy and delivered to his ordinary. For the *Placita Coronæ* of those times shew, that it was the constant practice of inquests *ex officio* to pass upon clerks pleading their *privilegium clericale*, where clergy was allowable the method whereof was thus. The clerk upon his arraignment pleaded his *privilegium clericale*; then came the ordinary and demanded him; then a jury *ex officio* was summoned to inquire into the truth of the charge; or as it is express in this record, "ad inquirendum, prout moris est, pro quali, &c. (i. e. pro quali eadem ordinario liberari debeat,)" and according to such inquest, the clerk was delivered to the ordinary as acquit, or con-

viſt. Thus are the entries upon the rolls, "A. B. indictatus de felonâ, eò quod, &c. & ductus coram rege, & allocutus qualiter se velit de felonâ prædictâ acquietare, dicit quòd clericus est, & sine ordinario suo non debet hic respondere; Et super hoc venit C. D. &c. Et petit ipsum tanquam clericum sibi liberari; sed ut sciatur pro quali eadem ordinario liberari debeat, inquiretur rei veritas per patriam." Then a jury *ex officio* was summoned, by which if it was found, "Quòd A. B. non est culpabilis, liberatur ordinario pro tali &c." But if culpabilis "liberatur ordinario tanquam clericus convictus, salvo custodiendus, sub pœnâ quâ decet &c." *Vide M. 20 & 21 E. 1. Rot. 4. in dorso, B. R. Hill. 22 E. 1. Rot. 15. Ibid. Trin. 30 E. 3. Rot. 11. B. R. Rex. Trin. 31 E. 3. Rot. 15. Ibid. Rex.*

temporal jurisdiction, but the privilege of clergy was never allowed them by our law: *vide stat' 21 Jac. (r)*.

Again, tho the ordinary took himself to be the judge of the allowance of the clergy and of the purgation of the clerk, yet the king's courts took that courage to make the ordinary but a minister, and themselves judges of the allowance and disallowance of the clergy and purgation. 21 E. 4. 21. b. 9 E. 4. 28. a.

And so the judges of the common law would oftentimes deliver the clerk to the ordinary, but *absque purgatione*, as where the clerk is attaint by outlawry or by judgment, or convict by his own confession, or upon an appeal. *Stamf. P. C. Lib. II. cap. 49.* 3 H. 7. 12. a. 10 E. 3. *Coron.* 247. *Hob. Rep.* 288. *Searle & Williams*, or if he were a notorious malefactor, *vide* 10 E. 3. *Corrn.* 247. or if he be convict by verdict of counterfeiting the seal or coin at common law before the statute of 25 E. 3. *Lib. Parl.* 18 E. 1. *Berton's case* (*), or if he be committed by record to the ordinary *absque* [329] *purgatione.* *Hob. ubi supra.*

And in these cases, if the ordinary admitted him to his purgation, he was fineable for it as a great misdemeanor, and the party deliverd by such purgation shall be again committed to prison, *M. 34 & 35 E. 1 Rot. 59. Kanc. B. R.* the case of *Hugh Forsham* deliverd by *William Testa*, and another commissioned from the pope (s); and the entry in such cases is, *liberatur ordinario tanquam clericus convictus & utlegatus ad salvò custodiend' periculo, quòd incumbit &c. & inhibi- tum est eidem ordinario, nè ad aliquam purgationem ipsius A. B. procedat domino rege inconsulto, eò quòd prædictus A. B. pro felonis &c. utlega- tus est &c.* H. 14 E. 3. *B. R. Rot. 19. Rex. Suff. Lond.* The case of *John de Hemmyngeston* chaplain. But indeed, if the clerk had had his clergy and were generally deliverd to the ordinary, he might

(r) *Cap. 28. §. 6 & 7.*

(*) *Ryley's Plac. Parl. p. 56.*

(s) That case was thus: Whilst the temporalities of the archbishop of *Canterbury* were in the king's hands, two clerks convict of felony imprisond in the archbishop's prison had been admitted to purgation, and deliverd out of custody by master *Hugh Forsham*, "Per mandatum magistrorum *Willielmi Testa*, & *Gerald*, clericorum papæ, administratorum spiritualitatis archiepiscopatus prædicti, absque mandato domini regis." *Forsham* was brought *coram rege*, and arraigned for the said offense; and the keeper of the

gaol was also arraigned for bringing the said clerks "coram præfato *Hugone* ad purgandum, absque præcepto domini regis;" and were both convicted by their own confession, and committed to the marshal, "Et postea finem fecerunt pro transgressionibus & contemptu prædictis." Afterwards the two clerks, who had been deliverd by such purgation, were brought from the tower, where they had been imprisond by the king's writ. "Et separatim allocuti qualiter de felonis prædictis se velint acquietare, dicunt quod clerici sunt, & liberantur ordinario sub pœnâ, quâ decet, &c.

admit him to make his purgation, and upon signification thereof by the ordinary into the chancery a writ should issue to the sheriff to deliver unto the party so purged all his goods and chattels seised into the king's hands upon that occasion, *nisi fugam fecerit eâ occasione.*

F. N. B. 66. *a* And all this is to shew, that whatsoever weight the clergymen laid upon their canons and their exemptions from the secular jurisdictions, yet their canons or constitutions, or pretensions or claims of this kind were not binding here, nor so taken farther than either by acts of parliament or the common acceptation of the kingdom they were received, and therefore these privileges received divers alterations and corrections and restrictions by [330] the temporal judges, as the occasion required.

² Hawk. P. C. ch. 33 per totum. ⁴ Blackf. Com. ch. 28. per tot. See Index to Foster. Tit. Clergy. Burn. Title Clergy. l. 2. Benefit of Clergy. ³ Peere Williams. 439—504.

CHAP. XLV.

In what offenses clergy is allowable or not.

NOW touching the offenses, wherein clergy is or was allowable, and in what not.

There are these general rules, that have influence in this whole discourse.

1. That in case of high treason against the king clergy was never allowable in this kingdom.

2. That at common law in all cases of felony or petit treason clergy was allowable, excepting two.

3. That where a statute makes a new felony, clergy is incident thereunto, unless it be specially taken away by acts of parliament; but where it makes a new treason, there is no clergy.

Upon these generals much of the succeeding business of this chapter, and some that follow will be built.

I. As to the first of these I say generally in all cases of high treason clergy was never allowed.

And this proposition will be considered two ways. 1. How the common law stood before the statute of 25 E. 3. *pro clero*, and 2. How it stood after.

The statute of 25 E. 3. *for the clergy* was made in the parliament held in *Hill*. 25 E. 3. which was in the same parliament, wherein the statute of declaration of treason is made, commonly called the *The statute of purveyance*.

By this statute *pro clero cap. 4.* it is enacted, " That all manner of
 [331] " clerks, as well secular as religious, which shall be from
 " henceforth convict before secular judges for any treasons
 " or felonies touching other persons than the king himself or his
 " royal majesty, shall from henceforth have and enjoy the privilege
 " of holy church, and shall be without impeachment or delay delivered to the ordinaries demanding them, and upon this the arch-
 " bishop promiseth, that upon the punishment and safe keeping of
 " such clerks offenders, which shall be delivered to the ordinaries, he
 " shall thereof make a convenient ordinance, whereby they shall be
 " safely kept and duly punished, so that no clerk shall take courage
 " to offend for default of correction.

At the same parliament it was declared what was treason, and among the rest counterfeiting the great or privy seal, or the king's coin is declared treason, and put in the same rank with compassing the king's death or levying of war, and it is thereby enacted, " That no
 " other offenses, than what are therein declared, be treason till declared by parliament.

Before this statute there were two sorts of treasons, that concerned the king, one was of a greater note, and another of a less note.

Those of the greater note were *conspiring the king's death, levying of war against the king, adhering to his enemies*, and two others, that are since abrogated by the statute of 25 E. 3. which came under the general and obscure names of *sedition*, and *accroaching of royal power*.

In any of these a party convict had not his clergy at common law, this appears by the judgment cited in the former chapter (a). *T. 21 E. 3. B. R. Rot. 23. Rex.*

But there were other treasons, that concerned the king, which were of an inferior note, namely *counterfeiting the seal and counterfeiting the coin* and these, (the latter especially,) had only judgment as in case of petit treason, namely to be drawn and hanged.

And it seems before the statute of 25 E. 3. *de proditionibus* clergy was allowd in both cases, as appears by the old book of *E. 3. B. R.*

(a) p. 327. *Gerberge's case.*

title *Clergy, placito ultimo*, and the judgment in parliament of 18 E. 1. in *Berton's* case, who being convict for counterfeiting the king's seal had his clergy, but *tradatur ordinario sine purgatione* (b).

But now as to the statute of 25 E. 3. *pro clero*, and the statute of 25 E. 3. at the same parliament *de proditionibus* laying them both together in all cases of treason touching the king himself or his royal majesty clergy is wholly taken away, and in all other cases of treason or felony clergy is allowd; and consequently in murder, robbery, petit treason clergy is settled by this act of parliament.

But whatsoever is declared treason against the king by the statute of 25 E. 3. *de proditionibus*, as well counterfeiting the seal or the money of the kingdom, as any other treason therein declared, is wholly exempted from clergy. 19 H. 6. 47. b. *Stamf. P. C. Lib. II. cap. 42. fol. 124. a. M. 31 E. 3. coram rege Rot. 18. Rex, in dorso, Bucks, casus abbatis de Mussenden* (c) *pro rescacatione & falsificatione legalis monete*, 24 H. 8. *Spelman's Rep. accordant adjudge. 2 Co. Instit. 635, 636. super Artic' cleri.*

So that at this day in all cases of high treason, whether those declared by the statute of 25 E. 3. *de proditionibus*, or any other treasons newly enacted since, the privilege of clergy is wholly taken away; and, (which is the second proposition above mentiond.)

II. In all felonies, that were at common law before the statute of 25 E. 3. *pro clero*, and in all cases of petit treason by that statute the privilege of clergy is restored and settled.

And therefore in all such felonies or petit treasons, which were such at the time of the statute of 25 E. 3. *cap. 4. pro clero* clergy is allowable, unless in such cases where it is taken away by subsequent acts of parliament, and so far forth only as the same is so taken away.

But in what cases subsequent acts of parliament have taken away clergy, where at the time of the statute of 25 E. 3. it was allowable, shall be the business of the next chapter.

But yet there seem to be two felonies, where clergy was not allowable notwithstanding this act, namely certain acts, [333] that by interpretation of law were hostile acts, which was the reason, that I long since heard Mr. Noy then the king's attorney give for it

(b) *Vide supra p. 328. See also Part I. p. 185, 186. in notis, & p. 223. in notis.* (c) *Part I. p. 216.*

in the king's bench about 7 *Car.* 1. viz. 1. *Insidiato viarum & depopulatio agrorum.* 2. Wilful burning of houses.

1. Concerning the former of these it appears, that *insidiatores viarum* and *depopulatores agrorum* were ousted of their clergy notwithstanding the statute of 25 *E.* 3. *cap.* 4. *pro clero.*

Rot. Parl. 4 *H.* 4 n. 30. there was a complaint in parliament by the archbishop of *Canterbury* and clergy, whereupon it was enacted, that *that* general clause should be left out in indictments and words of the same effect inserted, and that notwithstanding the indictment carried the same effect, yet benefit of clergy should not be denied, as appears at large by the statute of 4 *H.* 4. *cap.* 2.

2. As touching wilful burning of houses I have heard, as before, that clergy was not allowable by the common law, but of this more fully in the next chapter.

Now touching *sacrilege* tho some later statutes were made to oust clergy in that crime, yet it seems at common law or at least after the statute of 25 *E.* 3. *cap.* 4. *pro clero* it was allowable, as appears 26 *Affiz.* 27. where it is agreed by the justices, that a person indicted of robbing a chapel and breaking a church should have his clergy; but it seems, it was with this difference, that if the ordinary refused him, as he might, he should not have his clergy. 20 *E.* 2. *Coron.* 283. *Stamf. P. C.* 123, 124, but otherwise the court would allow it him. 26 *Affiz.* 27.

See the references at the end of Ch. XLIV. ante.

[334]

CHAP. XLVI.

Where and in what offenses, *that where capital at common law*, clergy is taken away *in part or in all by acts of parliament subsequent to* 25 *E.* 3. *and first, of petit treason.*

I HAVE before declared what capital offenses were exempt from clergy at common law, and how the law stood in relation thereunto before and by the statute of 25 *E.* 3. and have there settled it, that regularly in all capital offenses, except treasons, which touch the king, the offender is to have the privilege of his clergy.

But

But as touching treasons, that touch the king, by virtue of the common law and the declaration of that statute the benefit or privilege of clergy is not allowable, neither is there any statute, that hath altered the law in that point of treason, but it stands still excluded from the privilege of clergy.

But as to petit treason and felonies subsequent statutes have made great alterations as to the point of clergy from what was declared by the statute of 25 *E. 3. cap. 4. pro clero.*

The inquiry therefore touching the alterations made by subsequent statutes in point of petit treason and felony may be considered in this method.

1. What alterations have been made by acts of parliament in relation to new felonies made by acts of parliament since 25 *E. 3.* And

2. What alterations have been made in such offenses, as were petit treason or felony at the time of the making of that statute.

I. As to the former of these this general rule holds, that if an act of parliament make a felony, and doth not take away clergy [335] in exprefs words, in all those cases clergy is allowable.

And if it doth make a felony and takes away clergy not generally, but in such or such cases, regularly in other cases clergy is allowable, as if it takes away clergy in case the party be convicted by verdict, yet he shall have his clergy, if he stand mute.

But if it enacts generally, that it shall be felony without benefit of clergy, or that he shall suffer as in case of felony without benefit of clergy, this excludes it in all circumstances, and to all intents; and because I have before in the particular enumeration of felonies by act of parliament taken notice all along what are excluded of clergy and what not, I shall dismiss that part of the inquiry referring myself to the several acts of parliament, that enact the felonies themselves; and shall proceed to the second part of the inquiry.

II. Therefore as to those felonies, that were such at the time of the statute of 25 *E. 3. cap. 4. pro clero.*

I shall first deliver some general positions, and then proceed to the particular felonies themselves.

1. Therefore it is certain, that whatsoever petit treason or felony there was at the time of the making of that statute, it was within the privilege of clergy by force of that statute at least, except those two above mentioned in the last chapter.

2. That

2. That therefore all such petit treasons and felonies are at this day within clergy, unless where it is ousted by subsequent statutes now in force.

3. That where any statute subsequent to 25 E. 3. cap. 4. hath ousted clergy in any of those felonies, it is only so far ousted, and only in such cases and as to such persons as are expressly comprised within such statutes, for *in favorem vitæ & privilegii clericalis* such statutes are construed literally and strictly.

And therefore, if clergy be ousted as to the principal, it is not ousted as to the accessory; if as to the accessory *before*, it is not extended to the accessory *after*; if where the prisoner is convicted by verdict, it holds not as to a conviction by confession, nor as to an attainder by outlawry, nor to a standing mute, as we shall see in the subsequent instances.

4. That in all cases, where a subsequent act of parliament ousteth clergy in case of any felony, the indictment must precisely bring the party within the case of the statute, otherwise, altho possibly the fact itself be within the statute, and it may so appear upon the evidence, yet if it be not so alledged in the indictment, the party, tho convicted, shall have his clergy. *Stamf. P. C. fol. 130. a. Dy. 99. a. 183. b. 224. b. 261. a.*

5. Altho the case be so laid in the indictment, that it comes within the statute to exempt the prisoner from clergy, yet if upon the evidence it fall out that, tho it be a felony, yet it is not so qualified, as laid in the indictment, the jury ought to find him guilty of the felony simply, but not as to the manner laid in the indictment, (as for instance guilty of the felony, but not of the robbery, or not of the breaking of the house,) and thereupon the prisoner shall be admitted to his clergy; and this is commonly done.

And now I come to the particular offenses, wherein clergy is taken away from such felonies, where by the common law and the statute of 25 E. 3. cap. 4. it was allowable.

And those offenses are these that follow.

1 Petit treason. 2. Murder. 3. Manslaughter. 4. Rape. 5. Robbery. 6. Burglary. 7. Larciny of several kinds and degrees.

And I shall now pursue them in the same order, as they are set down.

First, Petit treason, as the servant killing his master, &c.

It

It is plain, that after the statute of 25 *E. 3. cap. 4.* clergy was to be allowd until 12 *H. 7. cap. 7.* & 23 *H. 8. cap. 1.*

The first statute, that ousted clergy generally in petit treason, was that of 12 *H. 7. cap. 7.* which yet extended but to conviction or attainder, and only to the principal not to the accessory.

By the statute of 23 *H. 8. cap. 1.* it is enacted, " That no
 " person, which shall be found guilty after the laws of the [337]
 " land for any manner of petit treason, or wilful murder of malice pre-
 " pensed, or for robbing any churches, chapels, or other holy places, or
 " for robbing any person or persons in their dwelling house or dwelling
 " place, the owner or dweller of the same house, his wife, children,
 " or servants then being within, and put in fear or dread by the same,
 " or for robbing any person or persons in or near the highways, or
 " for wilful burning of any dwelling houses or barns, wherein any
 " corn or grain shall happen to be, nor any person found guilty of
 " any abetment, procurement, helping, maintaining or counselling of
 " or to any such petit treasons, murders or felonies shall from hence-
 " forth be admitted to the benefit of clergy, except clerks in holy
 " orders, *viz.* in the order of subdeacon or above; and that such
 " persons in orders convict of those offenses shall be delivered to
 " the ordinary, but shall remain in prison without purgation, unless
 " he become bound by recognisance before the king's justices,
 " where he was convict, with two sufficient sureties for his good
 " behaviour.

" Persons attaind by judgment upon confession, outlawry, or verdict
 " admitted to clergy to remain in prison without purgation.

" Clerks convict, and upon their clergy allowd deliverd to the ordi-
 " nary may be degraded, and then sent into the king's bench by the
 " ordinary to receive judgment upon their conviction, and the justices
 " having the record before them shall give judgment upon such con-
 " viction, as if had not had clergy.

This act, tho temporary, was continued by the statute of 28 *H. 8. cap. 1.* and made perpetual by 32 *H. 8. cap. 3.* and by the same act persons in orders are put into the same condition, as other persons not in orders, notwithstanding this statute of 23 *H. 8. cap. 1.* or 25 *H. 8. cap. 3.*

This statute of 23 *H. 8.* as to all these crimes extended to principals and accessories before the fact, but not to accessories after.

But

But yet it extended to exclude principals and accessaries *before*, only in cases where they were found guilty after due course of law, *viz.* by verdict or confession, &c. and extended not to standing mute, &c. And therefore by the statute of 25 *H. 8. cap. 3.* it is enacted, “ That
 “ every person that shall be indicted of petit treason, wilful burning
 “ of houses, murder, robbery, or burglary, or other felony according
 “ to the tenor or meaning of the said statute of 23 *H. 8.* and there-
 “ upon arraigned do stand mute of malice or froward mind, or chal-
 “ lenge peremptorily above the number of twenty, or do not answer
 “ directly to the indictment and felony, whereof he shall be ar-
 “ raigned, shall be excluded from clergy in like manner, as if he had
 “ pleaded to the offense and been found guilty according to the laws
 “ of the land.

And provides, “ That if any person be indicted in a foreign county
 “ for stealing of goods in another county, and be found guilty, stand
 “ mute, challenge above twenty peremptorily, or will not directly
 “ answer, he shall be excluded from clergy, as he should have been,
 “ if he had been arraigned for the robberies or burglaries in the
 “ same shire where they were done, if by examination it shall ap-
 “ pear to the justices, that he had been indicted and arraigned in
 “ the county where the burglary was done, he should have been ex-
 “ cluded from his clergy by the said statute, had he been found
 “ guilty there.

This statute was but temporary, because bottomed upon the statute of 23 *H. 8. cap. 1.* that was but temporary, but by the statute of 28 *H. 8. cap. 1.* was continued till the last day of the next parliament, and by the statute of 32 *H. 8. cap. 3.* made perpetual.

But hitherto in this case of petit treason, (and indeed generally in all these cases of the statute of 23 *H. 8.*) there were these defects.

1. That as to the principal the statute of 23 *H. 8. cap. 1.* did extend to appeals, as well as indictments for the offenses described in that statute, and if they were found guilty by verdict or confession, the appellee and accessory *before* were excluded of clergy, but
 [339] statute of 25 *H. 8. cap. 3.* extended only to indictments, and therefore an appellee standing mute, &c. was to have his clergy in the cases of the statute of 25 *H. 8. cap. 3.* Again,

2. Neither of these statutes extend, where the party is outlawd for these crimes,

3. As

3. As the law was then taken, challenging above twenty had been a conviction, or at least had put the party to his penance; but that I may observe it once for all, now that clause of challenging above twenty mentiond in the statute of 25 *H. 8.* and other statutes hereafter mentiond imports nothing as to the point of clergy, for his challenge is over-ruled and he put upon the jury, as hath been before observed (*).

But because the statute of 1 & 2 *P. & M. cap. 10.* in case of petit treason restores the peremptory challenge of thirty-five, it should seem, that if he challenge peremptorily above thirty-five, he shall have the benefit of his clergy, for it is now become *casus omissus*.

And therefore by the statute of 4 & 5 *P. & M. cap. 4.* “ If
 “ any should maliciously command, hire or counsel any to commit
 “ petit treason, wilful murder, or to do any robbery in any dwelling
 “ house or houses, or to do any robbery in or near the highway, or
 “ to burn any dwelling house or any part thereof, or any barn then
 “ having any corn or grain in the same, then every such offender,
 “ 1. Being outlawd for the same, or 2. Arraigned and found guilty
 “ by order of law, or 3. Otherwise lawfully convict or attaint of
 “ the same, or 4. Who shall stand mute of malice or froward mind,
 “ or 5. Shall peremptorily challenge above twenty persons, or 6.
 “ Will not directly answer, is ousted of his clergy.

But *nota*, every indictment to oust the accessory *before* of his clergy must run *malitiosè*, otherwise he shall have his clergy. 2 *Eliz. Dy.* 183. *b.*

But now by the statute of 1 *E. 6. cap. 12.* it is enacted, “ That
 “ no person, that hath been, or shall be in due form of law attaint
 “ or convict of murder of malice prepensed, or of poisoning [340]
 “ of malice prepensed, or breaking any house by day or by
 “ night, any person being then in the house, where the same break-
 “ ing shall be committed, and thereby put in fear or dread, or of or
 “ for robbing any person or persons in or near the highways, or for
 “ felonious stealing of horses, geldings or mares, or for felonious
 “ taking goods out of any parish church or other church or chapel,
 “ or being indicted or appeald of any of the said offenses, and there-
 “ upon found guilty by twelve men, or shall confess the same upon
 “ his or their arraignment, or will not answer directly according to
 “ the laws of this realm, or shall stand wilfully or of malice mute,

(*) *p. 270.*

“ shall be admitted to have the privilege of clergy or sanctuary, but
 “ shall be put from the same, and that all persons in all other cases
 “ of felony, other than such as are before mentiond, which shall be
 “ arraigned or found guilty upon their arraignment, or shall not con-
 “ fess the same, or stand mute, or will not directly answer, shall have
 “ and enjoy the benefit of clergy and sanctuary, as they might have
 “ had before the 24th of *April* 1 *H.* 8.

This statute doth not restore clergy to the principal in case of petit treason, but leaves the law in relation thereunto, as it stood before, and upon the statutes of 23 & 25 *H.* 8. tho there be no word of *petit treason*, for if the opinion of *Walsh* and my lord *Dyer* *M.* 6 & 7 *Eliz.* *Dy.* 235. *a.* be law, *viz.* that a general pardon of all offenses except murder, doth not except petit treason, and so petit treason comes not within the expression of *felony*, then the clause, *that in all other cases of felony clergy shall be allowd*, doth not extend to allow clergy in petit treason.

But if that opinion be not law (*a*), (as I think it is not) then the exclusion of clergy from murder by this statute excludes it also in petit treason.

But if it did not, yet it does not restore clergy in petit treason to the principal (*b*), where found guilty or attaint, because before
 [341] 1 *H.* 8. clergy was taken away in petit treason from the principal by 12 *H.* 7. *cap.* 7.

Again, by the statute of 5 & 6 *E.* 6. taking notice, that by the act of 1 *E.* 6. the act of 25 *H.* 8. *cap.* 3. touching robbers and burglars arraigned in a foreign county, and ousting them of clergy by examination stands repeald, whereby offenders were much emboldened, it is enacted, “ That the said act made in the 25th year of King
 “ *H.* 8. touching the putting such offenders from their clergy, [and
 “ every article, clause and sentence contained in the same touching
 “ clergy] shall from henceforth touching such offenses from hence-
 “ forth to be committed or done stand, remain, and be in full strength
 “ and virtue in such manner, as it did before the making of the said
 “ act in the said first year of King *E.* 6. any clause, article or sen-
 “ tence comprised in the said act of 1 *E.* 6. to the contrary thereof
 “ notwithstanding.

(*a*) *Vide supra*, Part I. *cap.* 29. *p.* 378.

(*b*) The words here in the original MS. are [takes not away clergy from the princi-

pal,] but the scope of our author's argument plainly shews he intended to have wrote [does not restore].

Now

Now upon this act of 5 *E. 6. cap. 10.* it hath been taken, that not only the clause of the act of 25 *H. 8. cap. 3.* touching foreign felonies ousted of clergy upon examination, but the whole act of 25 *H. 8. cap. 3.* is re-enacted, and upon that account wilful burning stands by virtue of that act ousted of clergy, because ousted of clergy by 23 & 25 *H. 8.* tho no mention be made thereof in the statute of 1 *E. 6.* and accordingly resolved 11 *Co. Rep. 33.* *Alexander Poulter's case, de quo infra.*

Upon the whole matter it seems plain, that at this day in relation to petit treason the law stands thus.

1. The principal convict by verdict or confession is ousted of clergy by 23 *H. 8. cap. 1.* both in appeals and indictments.

2. The principal standing mute, or not directly answering is ousted of clergy by 25 *H. 8. cap. 3.* in cases of indictment, but not in case of an appeal; and the statute of 1 *E. 6. cap. 12.* doth not alter the case as to the principal in petit treason.

3. Yet I see no provision to oust clergy of a clerk attaint of petit treason by outlawry, but that he may claim his clergy and be delivered to the ordinary, as a clerk attaint without purgation, for this is not provided for, as it seems by these statutes. [342]

4. But in my opinion the statute of 1 *E. 6. cap. 12.* taking away clergy from persons attaint, as well as from persons convict of murder doth extend to petit treason, which is in truth murder, and consequently a person outlawd of petit treason, tho not by the statutes of 23 or 25 *H. 8.* yet the statute of 1 *E. 6.* is exempt from clergy under the name of wilful murder (*c*).

And the statute of 4 & 5 *P. & M. cap. 4.* taking away clergy from accessory *before* in case of petit treason, where attainted by outlawry, had committed a great piece of absurdity in putting the accessory in a worse case than the principal, unless the law had been taken, that the statute of 1 *E. 6. cap. 12.* had taken it away from the principal in the like case of outlawry, which is an attainder in law.

5. As to the accessory before the fact, he is ousted of clergy in all the cases before mentiond by the statute of 4 & 5 *P. & M. cap. 4.* and so the law stands at this day, but it must be laid *malitiosè.* 2 *Eliz. Dy. 183. b.*

(*c*) If this statute be construed to take away clergy from petit treason, it takes it away, as well in case of an appeal, as of an indictment, not only where the party is

convict by verdict or confession, but also where he will not answer directly, or shall stand wilfully mute,

6. But

6. But the accessory after the fact hath his clergy in all cases in petit treason, for no statute takes it from him.

I have been the longer in this, because it was necessary to take notice of the series of all the statutes, and to disintangle them, and it will serve for the briefer collection of what follows in other cases.

See the references at the end of ch. XLIV. ante.

[343] C H A P. XLVII.

Concerning the alteration made by several statutes in cases of murder, manslaughter, rape, and wilful burning of houses or barns with corn.

I. **I** Shall briefly consider how the privilege of clergy stands as to murder, and therein.

1. At the common law, and by the statute of 25 E. 3. cap. 4. clergy was to be allowed as well in murder, as any other felony.

2. Tho there were some particular statutes, that in particular cases took away clergy in case of heinous murders (*), yet the first general law, that took away clergy in case of wilful murder *ex malitiâ præcogitatâ* generally was 23 H. 8. cap. 1. which extended only to a conviction by verdict or confession, and included accessories *before*, and extended to appeals, as well as indictments.

3. The statute of 25 H. 8. cap. 3. extended only to indictments but not to appeals; to principals and not to accessories *before* or after.

4. But the statute of 1 E. 6. cap. 12. took away clergy from principals in murder in all cases, *viz.* conviction by verdict or confession, attainder by outlawry or otherwise, standing mute, or not directly answering (*a*), but this statute of 1 E. 6. extended not to accessories.

[344] 5. By the statute of 4 & 5 P. & M. cap. 4. all that shall maliciously command, hire, or counsel any to commit any wilful murder are ousted of clergy in all cases.

(*) Vide 12 H. 7. cap. 7. 4 H. 8. cap. 2: 22 H. 8. cap. 9.

(*a*) This statute omits the case of challenging above twenty, but this our author thinks unnecessary to be inserted, because since 22 H. 8. cap. 14. neither penance nor

judgment of death is to follow in that case, but only the challenge is to be overruled, *vide supra* p. 270. & *infra* cap. 48. however this omission is supplied by 3 & 4 W. & M. cap. 9. as to indictments.

6. But accessaries to murderers after the fact have their clergy in all cases.

So that the principal stands at this day ousted of clergy in all cases, and the accessary *before* is also ousted of clergy in all cases, but the accessary *after* is in no case ousted of clergy.

But it must be remembered, that the party indicted must be brought within the very letter of the statute.

If the indictment be *felonice & ex malitiâ suâ præcogitatâ interfecit*, yet he shall have his clergy, because there wants the word *murdravit*. *Dy 261. a.*

So if it be *felonice interfecit & murdravit*, and says not *ex malitiâ suâ præcogitatâ*, it is but an indictment of manslaughter, and the prisoner shall have his clergy.

So if a man be indicted, as accessary before, *viz. quòd præcepit*, and says not *malitiosè præcepit*. *P. 2 Eliz. Dy. 183. b.*

II. As to *manslaughter*, regularly in all cases the person indicted or appealed ought to be admitted to his clergy.

But if *A. B. and C.* be indicted specially upon the statute of 1 *Jac. cap. 8.* setting forth, (as the indictment must) "That *A. felonice pugit & percussit D.* not having any weapon drawn, nor having "stricken first, and that *B. and C.* were present, aiding and abetting," tho *A. B. and C.* are all principals in manslaughter at common law, yet *A.* only, that gave the stroke, shall be ousted of his clergy. *H. 23 Car. 1. B. R. Page's case. (b).*

And therefore it seems in that case, if it be found, that *A.* gave not the stroke, but *B.* and that *A. and C.* were aiding and abetting, not only *A. and C.* that gave not the stroke shall have their clergy, but also *B.* because, tho the case of *B.* is within the statute, yet as to him the indictment brings him not within the statute, and so differs from the case of a general indictment of murder, where tho it be laid, that *A.* gave the stroke, and *B.* was present, aiding and abetting, [345] yet if upon the evidence it appears, that *B.* gave the stroke, and *A.* was abetting, &c. both shall be convict of murder, for both are equally murderers, and the indictment is true as to both *quòd ex malitiâ suâ præcogitatâ interfecerunt & murdraverunt (*)*.

By the statute of 1 *Jac. cap. 8.* clergy is ousted as to him that so slays upon any conviction by verdict, confession or otherwise, and that as well in case of an appeal as of an indictment; but it extends

(b) *Styl. §6.*

(*) *Vide supra p. 292, 1 Salk. 334.*

not to standing mute or not directly answering, for there is no conviction in that case, and so it seems as to an outlawry (*c*).

III. As to *rape*, by the statute of 18 *Eliz. cap. 7*. If any man be convicted thereof by verdict or confession, or be outlawd for the same, he is excluded of clergy, but this act extends not to a standing mute or not directly answering, for this is *casus omissus* (*d*), and he shall have his clergy 11 *Co. Rep. 35. b* *Poulter's case*.

But at this day in all cases challenging above twenty makes nothing either for or against clergy, for the party shall not be put to his penance nor be convicted thereupon, but only his challenge shall be over-ruled and he put upon his trial, as hath been before observed (*†*), and therefore the clause in the act of parliament ousting clergy, where he challengeth above twenty, or the not mentioning of that clause makes nothing at this day one way or another as to the point of clergy.

But neither accessaries *before* or *after* are upon this statute exempt from the privilege of clergy.

IV. As to the case of *wilful burning*.

It stands now a settled point, that if the principal be convicted by verdict or confession, or stand mute, or will not directly answer, he shall not have his clergy, this is the point resolved 11 *Co. Rep. 35. a*. *Poulter's case*, and the constant practice is, and always hath been accordingly.

[346] And the statute of 4 & 5 *P. & M. cap. 4*. strongly proves the law to be so, for clergy is taken away from the accessary *before*, and it were a strange oversight, if an act of parliament should exempt the accessary from clergy in this case, and yet the principal should have the benefit of it.

That which caused the doubt was the statute of 1 *E. 6. cap. 12*. where it enumerates all the offenses, which were then to be exempt from clergy, and mentions not the case of wilful burning and enacts, "That in all other cases of felony the offenders shall have clergy, as they should have had before 1 *H. 8.*" and the first statute that took away clergy from wilful burning of houses or barns with corn was a statute made after 1 *H. 8. viz. 23 H. 8. cap. 1. & 25 H. 8. cap. 3*.

There have been three answers given hereunto (*), *viz.*

(*c*) But in all these cases the offender is excluded from clergy by 3 & 4 *W. & M. cap. 6*. upon an indictment, but not in an appeal.

(*d*) But this is provided for in case of an indictment by 3 & 4 *W. & M. cap. 9*.

(*†*) *p. 270.*

(*) *Vide Part I. p. 570, &c.*

1. That this was a felony, that even by the common law before 1 *H. 8.* was exempt from clergy, being an act of hostility, and this I remember was given by *Noy* attorney general about 8 *Car. 1.* but possibly this may be doubtful as to the fact, whether at common law clergy were not allowable upon this offense, and if it were not, yet it is a greater doubt, whether that law were not altered by the act of 25 *E. 3. cap. 4. pro clero*, wherein clergy was settled in all cases, except treasons or felonies, that touch the king or his royal dignity.

2. Others have agreed, that clergy was taken away in these cases of wilful burning by the statutes of 23 *H. 8. cap. 1.* and 25 *H. 8. cap. 3.* and consequently this offense not being enumerated in the statute of 1 *E. 6. cap. 12.* is by the general concluding clause of that statute restored to the benefit of clergy: But then they think, that by the statute of 5 & 6 *E. 6. cap. 10.* the statute of 25 *H. 8. cap. 3.* is wholly revived, and consequently now the repeal of the exemption of clergy in case of wilful burning is repealed by the revival of the statute of 25 *H. 8. cap. 3.* by the subsequent statute of 5 & 6 *E. 6. cap. 10.* and thereby exemption from clergy in case of wilful burning is again established.

But this hath in it many difficulties. 1. It seems by the whole scope of the preamble and the strict penning of the [347] body of the act of 5 & 6 *E. 6. cap. 10.* that that act revived only so much of the act of 25 *H. 8. cap. 3.* as concerns the ousting of felons of their clergy upon examination, where robberies or burglaries were committed in foreign counties. 2. Again, the statute of 25 *H. 8.* took away clergy from wilful burning, only in cases of indictment, and that only where the prisoner stands mute, answers not directly, or challengeth above twenty, but the ousting of clergy in case of appeals, as well as indictments upon conviction by verdict or confession stood purely upon the statute of 23 *H. 8. cap. 1.* which is no where revived as to the point in question, and yet that is the case, that must most ordinarily occur, namely, where the party is convicted.

3. Therefore the last and I think the surest answer as to this difficulty is, that the statute of 3 & 4 *P. & M. cap. 4.* taking away clergy in all cases from him that maliciously commands, hires, or counsels the wilful burning of any dwelling-house or barn with corn, in all cases of conviction, attainder, standing mute, outlawry, peremptory challenge of above twenty, or not directly answering, doth by necessary consequence take away clergy in all these cases from the principal offender in such wilful burning.

But *quâcunque viâ datâ* the law stands settled, that clergy is taken away in all cases from the principal in wilful burning of a dwelling-house or a barn with corn, *quod vide* 11 *Co. Rep. Alexander Poulter's case per totum.*

And therefore I can by no means think, that outlawry of the principal in this offense is within the privilege of clergy, for the accessory even in that instance is exempt from (e) clergy, by 4 & 5 *P. & M. cap. 4.*

Now as touching the accessory by the statute of 4 & 5 *P. & M. cap. 4.* they that shall maliciously command, hire, or counsel [348] this fact, *viz.* accessories *before*, are exempt from the benefit of clergy in all cases.

But accessories *after* are within the benefit of clergy in all cases.

See the references at the end of ch. XLIV. ante.

C H A P. XLVIII.

Concerning clergy in robbery from the house, or robbery from the person.

ROBBERY is of two kinds, from the person, and from the house of another.

First, Robbery from the person is a violent assault upon the person, and felonious and violent taking away his goods putting him in fear.

The principal in case of robbery in or near the highway is ousted of his clergy, *viz.*

1. By the statute of 23 *H. 8. cap. 1.* "Where he is convicted by verdict or confession, whether it be in an appeal or an indictment.

2. By the statute of 25 *H. 8. cap. 3.* "In an indictment, where the party stands mute, will not directly answer, or challengeth above twenty

And in case the robbery were in or near the highway in the county of *A.* and he carry the goods into the county of *B.* and there be indicted of larceny, and upon examination it appears it was such a rob-

(e) The MS. has it [*is subject to*] but both the statute and the sense require it should be [*is exempt from.*]

bery in the county of *A.* that had he been indicted in the county of *A.* he should have been ousted of his clergy by the statute of 23 *H. 8. cap. 1.* the justices of the county of *B.* shall oust him of his clergy in the county of *B.* whether he be convicted, stand mute, challenges above twenty, or answers not directly.

And tho this clause be repealed by the statute of 1 *E. 6. cap. 12.* it is again revived by 5 & 6 *E. 6. cap. 10.* and [349] stands now in force as to all robberies, where the party, if convicted, is to be ousted of his clergy by the statute of 23 *H. 8. cap. 1.*

But it extends not to any felony, where clergy is ousted by any statute after 23 *H. 8. Co. P. C. cap. 50. p. 115. Stamf. P. C. fol. 128. a. (*)*.

If *A.* commits a robbery near the highway in the county of *B.* and takes away but to the value of 6*d.* yet if indicted for robbery in the county of *B.* he shall have judgment of death without benefit of clergy, but if he carry those goods into the county of *C.* and there is indicted and pleads, and the jury find him guilty to the value of 6*d.* tho upon the evidence it appears that it was a robbery in the county of *B.* yet he shall not have judgment of death, because as it now stands, it is but petit larceny (*a*), where the prisoner is not to have his clergy but to be whipt, and the examination given by the statute of 25 *H. 8.* is only to oust clergy, where demandable. *M. 31 Eliz. Moore's Rep. n. 739. p. 550.*

If a man be indicted for a robbery *in viâ regiâ* (†), or *in altâ viâ*, or *in altâ viâ regiâ*, and be convicted, he shall be ousted of his clergy by the statute of 23 *H. 8.* but if it be laid to be in *in viâ regiâ pedestri ducent' de London ad Islington*, tho he be convicted, he shall have his clergy; adjudged 38 *H. 8. Moore's Rep. n. 16. p. 5.*

But in that case it might have been laid *propè altam viam regiam*, and he should have been ousted of his clergy, for the words of the statute are *in* or *near* the highway.

If a man be robbed upon the river *Thames*, or other public river within the body of a county, this is a robbery upon the king's highway, and may be so laid in the indictment, and the party shall be ousted of his clergy upon these statutes, and so it was agreed in *Hide's*

(*) *Vide Part 1. p. 518.* But by 3 & 4 *W. & M. cap. 9.* the like clause is enacted as to all felonies, wherein clergy was ousted by that or any other statute.

(a) *Vide Part 1. p. 536.*

(†) According to what our author says *Part 1. p. 535.* if the indictment be laid only *in viâ regiâ*, this will not be sufficient to oust clergy.

case at *Newgate*, *M.* 23 *Car.* 2. for the public streams are highways, and therefore they are called *haut streames le roy* (*).

But this statute of 25 *H.* 8. extends not to standing mute, or not directly answering in an *appeal*, but only in an *indictment*, and therefore,

3. The statute of 1 *E.* 6. *cap.* 12. ousts such robbery of clergy as well in an *appeal* as *indictment*, where the offender stands mute, or will not directly answer.

But mentions nothing of challenging peremptorily above twenty, neither need it, for, as hath been said (+), he shall be only put from his challenge, and the jury shall be charged to pass upon him, and no conviction or *peine fort & dure* shall ensue upon his peremptorily challenging above twenty, as the law now stands.

But whereas *Stamf. Lib.* II. *cap.* 42. *fol.* 129. *b.* affirms, "That upon all these statutes, and in all the cases mentioned in them there are two cases, wherein the offender in murder, robbery, &c. shall have his clergy, namely, where the offender is outlawed, or convicted by battle," it is not true of the former, for outlawry is an attainder, and tho 23 *H.* 8. & 25 *H.* 8. speak neither of outlawry nor attainder, yet the statute of 1 *E.* 6. *cap.* 12. saith, if any person be *attaint* or convicted of murder, &c. he shall be ousted of clergy.

And the same law it is, if the appellee of robbery be vanquished in an *appeal*, for he is thereby *convict*, and the statute doth not mention only a conviction by twelve men, but *any person in due form of law attaint or convicted of murder, &c.*

And thus far concerning principals.

As touching accessaries by malicious commanding, hiring or counselling any such robbery, they are ousted of clergy by 4 & 5 *P. & M.* *cap.* 4. in all cases, namely being convicted, standing mute, not directly answering, or outlawed, &c.

But accessaries *after* having the benefit of clergy in all cases.

Secondly, As touching a robbery from the house of any person.

This divides itself into these several heads.

[351] 1. Robbing in the dwelling house, the owner, his wife or family in the house and put in fear.

2. Robbing in the dwelling house, *any person* being in the house and put in fear.

(*) *Vide Pari.* I. p. 536.

(+) *Supra*, p. 270.

3. Robbing in the house or tent, the owner, his wife, or servants being in the house, tho not being put in fear.

4. Robbing a house, and no person being therein.

As to these in their order.

I. Robbing any person in his dwelling house or dwelling place, the owner or dweller, his wife, children, or servants being within the same and put in fear or dread by the same.

By the statute of 23 *H. 8. cap. 1.* as well in an appeal as an indictment, the principal and accessory before the fact are ousted of clergy in two cases, namely,

1. If convicted by verdict. 2. If convicted by confession.

By the statute of 25 *H. 8. cap. 3.* there is farther provision made, but only in case of indictment, not of appeal, and only against the principal, but not the accessory *before or after, viz.* 1. If the principal stand mute of malice or froward mind. 2. If he challenge above twenty peremptorily. 3. If he will not directly answer.

There is farther provision made for ousting of clergy, where robbers of houses carry the goods into another county and be there indicted of larciny, if upon examination they should be ousted of clergy, had they been indicted in the first county; but, as hath been before observed,

1. This ousting of clergy by examination in a foreign county refers only to such robbery, as by the statute of 23 *H. 8. cap. 1.* is ousted of clergy, namely, where the owner, his wife, children, or servants are then in the house and put in fear, not to such robberies, as by acts of parliament made since are put out of clergy. 2. In case of an arraignment in a foreign county, if the goods prove to be but of the value of 12*℥*. here is no clergy to be demanded or allowed, being but petit larciny, and therefore no ousting of clergy by examination.

Dorothy Cole (*) was indicted in *Suffex* for stealing goods, upon the evidence it appeared, that she broke a house in *Kent*, [352] and brought the goods into *Suffex*, the jury found the goods to be of the value but of 7*s.* yet in as much as there was no putting in fear of the owner, his wife, or family, she was to have the benefit of the statute of 21 *Jac.* and could not be ousted of it by examination, for tho by the statute of 39 *Eliz. cap. 15.* clergy was taken away, yet the taking away of clergy upon examination in a foreign county extends only

(*) *Vide Part I. p. 518.*

to robberies where clergy is taken away by 23 *H. 8.* but if it had been with a putting in fear, so that in case of a man he should have been ousted of his clergy, it deserves consideration, whether the woman, if under 10*s.* should have been ousted of the benefit of the statute of 21 *Jac. cap. 6.* by examination, tho originally it were a burglary and robbery. *Sed de hoc infra.*

But these statutes did not extend to any such robbery, where 1. There was no putting in fear. 2. Where the owner, his wife, children or servants were not in the house, but only a stranger were there and put in fear. 3. Neither did they extend to one attaint by outlawry or battle. 4. The statute of 25 *H. 8.* extended not to appeals.

As to the accessaries before the fact, by the statute of 4 & 5 *P. & M. cap. 4.* it is enacted, "That if any shall command, hire, or counsel any person to do any robbery in any dwelling house or houses, they shall be excluded from clergy in all cases, *viz.* convict, outlawd, standing mute, &c.

Upon this statute these things are observable.

1. It requires an actual robbing, *viz.* taking away some goods; a bare breaking of the house is not sufficient.
2. It extends to a robbing, without mentioning *put in fear.*
3. It extends to outlawry, which 23 or 25 *H. 8.* extended not to.
4. It extends to appeals as well as indictments; but accessory *after* are in no case excluded from clergy.

[353] II. Robbing of any person by day or night, any person being then in the same house, and put in fear or dread thereby.

By the statute of 1 *E. 6. cap. 12.* clergy is taken away in all cases, *viz.* if he be attaint by outlawry or otherwise, convict by verdict, confession, or wager of battle, stands mute, or will not directly answer: And this as well in appeals as indictments.

It is true, it mentions not peremptory challenge of above twenty, neither is it material for the reason before given.

But this statute, tho it speaks generally of breaking a house by day or by night, hath had this construction always allowd, *viz.*

If the breaking of the house be in the night, then it must be such a breaking as amounts to burglary, *viz.* with an intention to commit a felony, and then it ousts clergy, if it be with a putting in fear.

If

If it be a breaking the house in the day-time, then it must be also a breaking, as hath an actual robbery joined with it, and then if there be a putting in fear also, the clergy is ousted in all the cases mentioned in this statute.

But in both cases there must be a putting in fear, otherwise this statute ousts not clergy.

This statute therefore hath made these additions to the statutes of 23 & 25 H. 8. viz. 1. It exempts burglary from clergy, tho there be no robbery, if there be a putting in fear. 2. If there be a burglary in the night, or robbery in the day committed in the house, and any stranger be then in the house and put in fear, it excludes from clergy, tho it be not the owner or any of his family. 3. It excludes the principal from clergy in all cases, where he is not excluded by any of the two former statutes (*b*).

But again on the other side, it restores clergy to the accessory before the fact, tho convict by verdict or confession, and repeals so much of the statute of 23 H. 8. as excludes the accessory *before* from clergy. But as hath been said, the statute of 4 & 5 P. & M. cap. 4. takes off the clergy again from accessories where there is a robbery and a putting in fear, but not where there is only a burglary with a putting in fear, but without robbery; but accessories *after* in all cases have their clergy. [354]

III. If any person be found guilty of robbing any person in any part of his dwelling house or dwelling place, the owner or dweller of the same house, his wife, children, or servants then being within the same, or in any other place within the precinct of the same house or place, such offender shall not be admitted to his clergy, whether such dweller or owner, his wife or children then and there being shall be sleeping or waking. 5 & 6 E. 6. cap. 9.

And the same provision is made for excluding clergy, where a person shall commit a robbery in a booth or tent in any fair or market, the owner, his wife, children or servant being then in the same booth sleeping or waking.

Upon this act we are to observe,

1. There must be an actual breaking of the house, such a breaking as would make a burglary if committed in the night, and the indictment must run *fregit & intravit dominum mansionalem* J. S.

(*b*) Viz. in case of attainder by outlawry, and also in case of standing mute, or not directly answering in an appeal.

præfato J. S. uxore & liberis suis in eadem domo existent, and such a breaking of the house must be provided in evidence: *vide supra, Lib. I. cap. 44. p. 522.*

2. The alleging of such a breaking of the house is sufficient to bring him within the statute to oust him of his clergy, if it be proved, tho it be not alleged by the way of robbery, *viz. violentè & à personâ*, but only *è domo prædictâ*, for it countervails a robbery within this statute.

If the servant steal goods out of his master's house in the day or night, the master, his wife and children being in the house, the servant is not to be ousted of clergy by this statute, for here is no breaking of the house.

If the servant unlatch a door, or turn a key in a door in the house and steal goods out of that room, tho if he had been a stranger, that had not to do in the house, he should hereupon be ousted of his clergy, yet it seems to me the servant shall not be thereupon ousted of his clergy, for the opening the door in this manner is [355] within his trust and so no breaking of the house, nor robbery within this act, and the same law seems to be upon the statute of 39 *Eliz. cap. 15.*

But if the servant break open a door, whether outward or inward, (as for the purpose a closet study, or counting-house,) and steal goods, this is a robbery and breaking the house within this statute, as also within the statute of 39 *Eliz.* for such a breaking, tho by a servant in the night, would make burglary, for such an opening is not within his trust.

3. But there must not only be a breaking of the house, the owner, his wife, children or servants being within the same, but there must be also a felonious taking of the goods out of the house to exclude clergy by this statute.

4. But a bare felonious taking of goods out of the house, whether by night or day without such a breaking, as would make burglary, if done in the night, excludes not from clergy within this statute.

5. This statute both as to robbery in dwelling houses or booths requires, that the dweller or owner, his wife, children, servants or servant be then within the house; so that the being of a stranger in the house excludes not clergy no more than upon the statutes of 23 *H. 8. cap. 1. Stamf. P. C. fol. 129. b.*

6. It

6. It extends to no other case, but where the party is found guilty, viz. either by verdict or confession, and not to outlawry, standing mute, or not directly answering, therefore in all these cases the offender shall have his clergy. (c).

7. It extends to an appeal, as well as indictment.

8. It doth not exclude accessaries neither *after* nor *before* from clergy.

Neither doth the statute of 4 & 5 P. & M. cap. 4. extend to accessaries in this case, but only where robbery is committed, and any person within the house put in fear.

So that upon this statute all accessaries to the felony described by this statute are to have their clergy.

IV. Robbing from the house goods to the value of 5s. in the day-time, no person being in the house. [356]

By the statute of 39 Eliz. cap. 15. it is enacted, "That if any person be found guilty by verdict, confession, or otherwise for the felonious taking away in the day-time of any money, goods or chattels of the value of 5s. or upwards in any dwelling house or houses, or any part thereof, or in any outhouse belonging or used with the said dwelling house, altho no persons shall be in the said house or outhouse at the time of the felony committed, such persons shall be excluded from their clergy.

1. Altho this statute speak only of *felonious taking* in the body or purview, yet inasmuch as in the preamble it speaks of *robbery* of houses, a bare taking of goods out of a house, no body therein, without an actual breaking of the house, such as would make burglary were it in the night, is not such a taking out of a house, as excludes from clergy, and thus it hath constantly obtained in practice against the opinion in *Popham's Reports* 84. *Bayne's case* (d).

2. The indictment must run according to the statute, viz. *quod tempore diurno, scilicet inter horas &c. domum mansionalem J. S. fregit & intravit nullā personā in eadem domo tunc existente, & ibidem &c. in eadem domo inventa adtunc & ibidem felonice furatus fuit, cepit & asportavit*, for breaking the house in the day without taking goods is no felony. 11 Co. Rep. 36. a. b. *Poulter's case*.

(c) But by 3 & 4 W. & M. cap. 9. clergy is taken away in these cases also.

(d) This case therefore was not esteemed to be law, *Kel.* 68. but now by 10 & 11 W. 3. cap. 23. clergy is taken away from all, who shall by night or day privately

and feloniously steal to the value of 5s. in any shop, ware-house, coach-house or stable, or by 12 Ann. cap. 7. to the value of 40s. in any dwelling house or outhouse thereto belonging, altho it be not broken, nor any person therein.

And if upon the evidence it fall out, that it was in the night, or that any person was in the house at the time, or that he stole, but broke not the house, he shall be found guilty of a simple felony and have his clergy, but not guilty according to the statute (e).

[357] But there need not either in this case, or upon the statute of 5 & 6 E. 6. above-mentiond be a formal mention of a robbery, as is used in an indictment for robbery from the person, for *fregit domum* imports it.

3. It takes away clergy only from the principal, and that only where the person is convict by verdict, confession, or otherwise, and therefore excludes not clergy, where the party stands mute, or is outlawd (f), or will not directly answer, nor from the accessary. 11 Co. Rep. 36. b. *Poulter's case*.

4. If a man break the house in the day-time with intent to steal, but steals nothing, this is no felony, but otherwise in case of breaking the house in the night with intent to steal, this is burglary 11 Co. Rep. 31. b. *Poulter's case*.

If a man enter by the doors or windows open and steal goods, this excludes not clergy upon this statute, nor upon the statute of 5 & 6 E. 6. cap. 9. for it must be such an act to make a robbery within either of these statutes, as would make a burglary, were it in the night; it must be *fregit & intravit*.

And therefore the constant use at *Newgate* is, and always hath been upon these statutes, that if a man enter the doors being open, and breaks open a chest and steals goods to the value of 5 s. this shall not oust him of his clergy within this statute, or the statute of 5 & 6 E. 6. c. 9. (g).

But if a man enters an house the outward doors being open, and when he is in the house, breaks open, or unlocks or unlatcheth an inward door and steals goods out of the room to the value of 5 s. he shall be ousted of his clergy upon this statute, the same being done in the day-time no body being in the house; or if he steals goods of any value out of that inward room so opened by day or by night, the owner of the house, his wife, children, or servants being in the house,

(e) But these cases are now provided against by 10 & 11 W. 3 & 12 Ann above-mentiond. *Vide Part I. p. 564. in notis.*

(f) These cases are since taken in by 3 & 4 W. & M. cap. 9. by which statute

clergy is also taken away from all who comfort, aid, abet, assist, counsel, hire, or command.

(g) *Vide Part I. p. 523, 524, 527, & Kel. 69.*

he shall be ousted of his clergy, being indicted upon the statute of 5 & 6 E. 6. cap. 9.

T. 16 Car. 2. Simpson's case (h) at Cambridge assises. A. [358]
being indicted upon the statute of 39 Eliz. it was found by special verdict, that *A.* breaking into the house by day, no body being in the house, and breaking open a chamber-door and a chest, took out goods to the value of 5*s.* and laid them on the floor, and before he could carry them out of the house was taken: By the advice of all the judges of *England* he was ousted of his clergy upon this statute, for the taking them out of the chest was felony, and the statute doth not alter the felony, but excludes from clergy, if it were done in the house, and of the value of 5*s.* and none in the house.

*Trin. 13 Car. 1. Evans & Finch (i) were indicted, for that they tempore diurno, viz. circa horam 12. did break domum mansionalem Hugonis Audley in the Inner-Temple London, nullā personā in eadem domo existente, and stole thence 40*s.* Upon a special verdict found in this case, these points were resolved.*

1. That a chamber in an inn of court is *domus mansionalis* within this statute.

2. That if no body were in the chamber at the time, tho others were in other chambers of the temple, yet this was a breaking of the *domus mansionalis* Hugonis Audley *nullā personā in eadem domo existente*, and maintains the indictment.

3. Because only one of the persons indicted did actually enter the chamber and took out the money, *viz. Evans*, and the other stood without upon the ladder and received it, *Evans* was excluded his clergy, and the other who stood upon the ladder and received the money had his clergy.

And possibly the same law may be upon the statute of 5 & 6 E. 6. cap. 9. that he only, that enters the house in the day- [359]
time without putting in fear, and actually takes the goods shall be excluded from clergy, and those, that stand without the house and

(h) According to this state of the case here was a breaking not only of a chest, but also of a chamber-door, which is on all hands agreed to be an act sufficient to make a robbery within the statute, and so the difficulty removed, which arises from this case, as stated above *Part I. p. 524 & 527*, and indeed as that case is reported in *Kelyng p. 31.* and in *hoc libro Part I. p. 508. & p. 526.* the question about the chest or trunk seems to have been only

with relation to the taking away, whether the taking goods out of a chest and laying them on the floor without carrying them out of the chamber was a taking away or stealing within the statute, and not whether it was a robbery, for if it were a stealing, that would be clear by the breaking open the chamber-door.

(i) *Cro. Car. 473. vide Part I. p. 527. 556.*

are present and abetting, tho all principals, yet shall have their clergy, for I can see no difference in the cases; *quære tamen* (k).

But if it were a burglary, then as well those without, that were present and assisting, as those within, shall be excluded from clergy by the general words of the statute of 18 *Eliz. cap. 7. they that commit any manner of burglary*; and the like in rape and in murder.

And so I do take it without any difficulty, if *A. B. & C.* come to commit a robbery upon the person of a man, and *A.* only takes the money from the person, and *B.* and *C.* are present and assisting, or if they break a house in the day-time and commit a robbery in the house putting in fear, tho *A.* only enters the house, and *B.* and *C.* watch without, they shall be all excluded from clergy, for they are all robbers.

And if it should be otherwise, this great absurdity would follow, that *B.* and *C.* that are present, aiding and assisting in the robbery, should have a greater privilege, where they are present and so principals in the felony, than they should have had, if they had been absent, and only accessaries before the fact, in which case the statute of 4 & 5 *P. & M. cap. 4.* excludes them from clergy in all cases.

See the references at the end of ch. XLIV. ante.

(k) This doubt is now at an end, for by 3 & 4 of *W. & M. cap. 9.* clergy is excluded from all aiders, abettors, &c.

[360]

CHAP. XLIX.

Concerning clergy in burglary,

BURGLARIES may be of two kinds. 1. Simple burglary, that hath no robbery joined with it. 2. Burglary, that hath robbery or theft joined with it.

I. The former of these is, when a man in the night-time breaks and enters a house to the intent to commit a robbery, theft, or other felony.

And this, as it had the benefit of clergy by the common law and by the statute of 25 *E. 3. cap. 4. pro clero*, so it was not ousted of clergy neither

neither by the statute of 23 *H. 8.* nor the statute of 25 *H. 8.* but the first statute that ousted clergy in burglary was 1 *E. 6. cap. 12.*

This simple burglary is again of two kinds. 1. Where any person is in the house and put in fear or dread. 2. Where no person is put in fear or dread, as possibly where no person is in the house, which yet taketh not away the offense of burglary. *Popham's Rep. 42. per omnes justiciarios Angliæ*, or if any person being in the house, yet is sleeping and perceives not the burglary till the next morning, &c.

1. In the *first* of these cases of simple burglary, namely with putting in fear or dread, the statute of 1 *E. 6. cap. 12.* takes away clergy from the principal in all cases, *viz.* tho attaind by outlawry or otherwise, or convict, or standing mute, or not directly answering, as appears by the statute itself, and the interpretation made of it. *Stamf. P. C. fol. 126. a. 11 Co. Rep. Poulter's case.*

But clergy is not taken away from accessaries *before* or *after* by this or any other statute, for as to the statute of 4 & 5 *P. & M.* tho it take away clergy from those, that maliciously command, or hire, or counsel any person to do any robbery in any dwelling house, yet unless there be a robbery in the dwelling house, as well as a burglary, it takes not away clergy from the accessory *before* [361] (*a*), nor at all from the accessory *after*.

2. As to the *second* kind of simple burglary without putting in fear, the statute of 18 *Eliz. cap. 7.* generally takes away clergy from all persons that shall commit any manner of burglary in three cases. 1. If he be outlawed for it. 2. If he shall be found guilty of it by verdict, or 3. If upon his arraignment he shall confess it.

But in all other cases of standing mute, or not directly answering he is to have his clergy (*).

And therefore, if a man be generally indicted of burglary without pursuing the statute of 1 *E. 6. cap. 12. viz.* without alleging in the indictment, that the owner, his wife, children or servant were in the house and put in fear, the prisoner standing mute, or not directly answering shall have his clergy, (namely, where the indictment is general,) notwithstanding the statute of 18 *Eliz. cap. 7.*

But the accessaries as well *before* as *after* are within privilege of clergy, for neither this nor any other statute hath excluded them (*a*).

(*) By the said statute of 3 & 4 of *W. & M.* clergy is taken away also in cases of standing mute, or not directly answering.

(a) But by 3 & 4 of *W. & M. cap. 9.* clergy is taken away from the accessory before the fact.

II. But now as to burglary joined with larceny or robbery in the dwelling house, this again is of two kinds, either with putting in fear, or without putting in fear.

If with putting in fear, then by the statute of 23 *H. 8. cap. 1. & 25 H. 8. cap. 3.* the owner or dweller, his wife, children, or servants being within the house and put in fear, the offender is ousted of his clergy, not upon the account of the burglary simply considered, but upon the account of the robbery, if the party be found guilty by verdict or confession, or stand mute, or will not directly answer.

But by the statute of 1 *E. 6. cap. 12.* he is excluded from clergy in all cases, if any person were in the house and put in fear.

[362] And altho as to the accessaries *before*, the statute of *E. 6. cap. 12.* restores clergy unto them, yet by the statute of 4 & 5 *P. & M. cap. 4.* clergy is in this case taken away from accessaries before the fact, *viz.* counsellors, or commanders to do any robbery in a mansion-house are ousted of clergy in all cases.

But if it were a burglary joined with robbery of goods out of the house, whether the party were put in fear or not, the principal is ousted of clergy by the statute of 18 *Eliz. cap. 7.* upon the single account of the offense of burglary, (if the offender be outlawed or convicted by verdict or confession,) for that statute as to the point of clergy is not at all concerned as to the robbery, but singly upon the account of burglary the clergy is ousted, tho he be acquit of the robbery or larceny.

But then as to the accessaries before the fact it is considerable, whether in burglary joined with robbery without putting in fear the accessory shall be ousted of clergy by the statute of 4 & 5 *P. & M. cap. 4.* it seems to me to be with this difference.

If the principal be indicted upon the statute of 5 & 6 *E. 6. cap. 9.* specially, setting forth, that the offender *felonice & burglariter fregit domum J. S. prædicto J. S. uxore, liberis & servientibus suis in eadem domo existentibus*, and stole the goods in the same house, then the accessory to such an indictment shall be arraigned and tried, and if convicted shall be ousted of his clergy by force of the statute of 4 & 5 *P. & M. cap. 4.*

But if in that case the principal be convicted of the burglary, but acquit of the robbery, the accessory shall have his clergy, for the statute of 4 & 5 *P. & M.* doth not exclude the accessory from clergy, but where there was a robbery.

And

And again, if the principal be indicted generally of burglary and robbery without forming the indictment either upon 23 *H. 8.* of putting in fear, or upon the statute of 5 & 6 *E. 6.* the owner, his wife or children being in the house, tho the principal be convicted and ousted of his clergy by the statute of 18 *Eliz.* yet the [363] accessory shall have his clergy, altho here were a robbery committed in the dwelling house, and so within the statute of 4 & 5 *P. & M. cap. 4.* and the reasons are apparent.

1. Because the principal is not ousted of his clergy in respect of the robbery, for that not being laid according to either of the statutes of 23 *H. 8.* or 5 & 6 *E. 6.* if there were no burglary in the case, he should have had his clergy, and he is ousted of his clergy merely upon the account of the burglary by the statute of 18 *Eliz. cap. 7.* and not of the robbery, because not laid pursuant to either of these statutes of 23 *H. 8.* & 5 & 6 *E. 6.* and the statute of 4 & 5 *P. & M.* ousts the accessory of clergy in relation to the robbery in the dwelling house, and not in relation to the burglary.

2. Because the statute of 4 & 5 *P. & M.* cannot at all have any respect to the statute of 18 *Eliz.* which was made twenty years after, and at the time of the statute of the queen neither simple burglary, nor burglary joined with robbery had ousted the principal of clergy, unless the robbery were pursuant to the statutes of 23 *H. 8.* or 5 & 6 *E. 6.* which is not laid in the indictment pursuant to either, and therefore the accessory could not be ousted of clergy by 4 & 5 *P. & M.* in this case, when if the principal himself had been indicted of burglary and robbery generally, he should have had his clergy both as to the burglary and as to the robbery; so that upon a general indictment of the principal of burglary and robbery in the house, the accessory can in no sort be excluded of clergy, unless the principal be specially indicted of the robbery pursuant to the statute of 23 *H. 8.* the owner, his wife or children being in the house and put in fear, or according to the statute of 5 & 6 *E. 6. cap. 9.* the owner, his wife or servants being in the house, for tho the principal upon a general indictment of burglary and robbery may be ousted of his clergy by the statute of 18 *Eliz.* if found guilty of the burglary, yet he cannot be ousted of his clergy upon the account of the robbery, because not particularly laid according to the old statutes, and consequently the accessory must [364] in that case have his clergy (*b*).

(*b*) But as to this point the law is now altered, for by 3 & 4 *W. & M. cap. 9.* clergy is taken away from the accessory before in all cases of burglary.

But in all cases accessaries *after*, must have their clergy.

See the references at the end of ch. XLIV. ante.

CHAP. L.

Concerning clergy in simple larceny and other felonies.

I Come now to consider of some other kinds of felonies, wherein clergy is taken away, and especially in larcenies of several kinds.

1. Stealing of horses. 2. Sacrilege. 3. Taking from the person *clām & secretè*. 4. Servants robbing their masters. 5. Taking clothes off from racks. 6. Stealing king's stores. 7. Taking away women against their wills. 8. I shall consider of piracies and robberies upon the sea. 9. Concerning clergy of prisoners arraigned before the steward and marshal.

1. By the statute of 1 E. 6. cap. 12. the felonious stealing of horses, mares or geldings is put from the privilege of clergy.

1. If the person be attainted. 2. Or convicted by verdict or confession. 3. Or stands mute. 4. Or will not directly answer. This was in effect enacted before by 37 H. 8. cap. 8. but it was necessary to be re-enacted here, because otherwise the general clause in the act of 1 E. 7. cap. 12. restoring clergy in all cases where they had it before 1 H. 8. had restored clergy in this case.

[365] There arose a doubt, whether, if there were one horse, mare, or gelding stolen, the offender should have had clergy; and the reason of the doubt was not singly, because the statute of 1 E. 6. was in the plural number, *horses, mares, or geldings*, for then it might as well have been a doubt, whether upon the statute of 23 H. 8. cap. 1. he, that had wilfully burned one house, should not have had his clergy, because the words of that statute are in the plural number *dwelling houses or barns*; and so for robbing any *churches or chapels*.

But the reason that made the scruple was, because the statute of 37 H. 8. cap. 8. was expressly penned in the singular number, *If any man do steal any horse, mare or filly*: and then this statute of 1 E. 6. thus varying the number, and yet expressly repealing all other exclusions of clergy introduced since the beginning of H. 8. made some doubt, whether

whether it were not intended to enlarge clergy, where only one horse was stolen.

To remove this doubt was the statute of 2 & 3 E. 6. cap. 33. whereby clergy is excluded from him that steals one horse, gelding or mare in all the cases of attainder, conviction, standing mute, or not directly answering.

These statutes exclude the principal from clergy in all these cases, but the accessory *before* or *after* have the privilege of clergy. 1 Mar. Dy. 99. a.

But by the statute of 31 Eliz. cap. 12. *in fine statuti* accessories both *before* and *after* in horse stealing are ousted of clergy, as the principal ought to be.

II. As to sacrilege, *viz.* the felonious taking of any goods out of any parish church, or other church or chapel, the principal is ousted of clergy by the statutes of 23 H. 8. cap. 1. 25 H. 8. cap. 3. and lastly by 1 E. 6. cap. 12. in all cases above-mentioned.

And by the statute of 23 H. 8. cap. 1. the accessory *before*, if found guilty by verdict or confession, was of clergy, but that is repealed by 1 E. 6. cap. 12. as to all accessories.

And the statute of 4 & 5 P. & M. cap. 4. extends not to this case, for it takes away clergy from robbery of any dwelling house, but doth not extend to robbing of churches or chapels (c). [366]

And certainly clergy was not taken away in case of sacrilege at common law, or if it were, yet the statute of 25 E. 3. *pro clero* cap. 4. restored clergy in that case as well as others, and the statutes of 23 H. 8. & 1 E. 6. had been needless in this case, if sacrilege were ousted of clergy at common law, and accordingly in the book of 26 Affiz. 19. (d) and consequently it is mistaken in *Poulter's* case 11 Co. Rep. 29. b.

III. As to picking of pockets, by the statute of 8 Eliz. cap. 4. "If any person be indicted or appealed for felonious taking any money, goods, or chattels from the person of another *privily without his knowledge* in any place whatsoever, and be found guilty by twelve men, or confess upon his arraignment, or be outlawed, or stands obstinately mute, or will not directly answer, or challenge peremptorily above twenty, he shall be excluded from clergy.

(c) But if this should be construed a burglary, as it seems to be according to the book of 22 Affiz. 95. then clergy would be excluded from the accessories *before*, by the 3 & 4 of W. & M. cap. 9.

(d) *Vide* accordant 26 Affiz. 27. *Corone* 193. *Vide contra* 20 E. 2. *Corone* 283. but according to *Stamf. P. C. fol. 123. b.* it was left to the discretion of the ordinary to claim him or not. *Vide Co. P. C. p. 114.*

Upon this statute these things are observable.

1. It must be taken from the *person*.
2. It must be taken *privily without his knowledge*, and so laid in the indictment, otherwise he shall have his clergy.
3. The goods must be above the value of 12*d.* for tho in robbery of never so small a value clergy is ousted, because done *violently*, yet here it is otherwise, for if it be not above the value of 12*d.* it is but petit larceny, for the statute did not intend to alter the nature of the crime, but to exclude clergy, where it was grand larceny. *Co. P. C. cap. 16. p. 68. (e).*
- [367] 4. It doth not oust the accessory either *before or after* of the privilege of clergy.

IV. Concerning servants carrying away their masters goods to the value of 40*s.* this was made felony by the statute of 21 *H. 8. cap. 7. (f).* And by the statute of 27 *H. 8. cap. 17.* clergy was taken away.

By the statute of 1 *E. 6. cap. 12.* restoring clergy in all cases, as it was before 1 *H. 8.* except the cases mentioned in that statute, clergy is restored to that offense.

By the statute of 1 *Mar. cap. 1.* repealing all felonies enacted since 1 *H. 8.* the very act itself of 21 *H. 8.* making this felony is repealed.

But by the statute of 5 *Eliz. cap. 10.* the statute of 21 *H. 8.* is again re-enacted to have continuance for ever; but the statute of 27 *H. 8. cap. 17.* taking away clergy in that offense is not revived and so clergy stands allowable as to that offense at this day *(g).*

V. By a statute made the 22 *Car. 2. cap. 5.* clergy is taken away from those that steal clothes off the racks, with power in the judge to transport them to the king's plantations *(h).*

VI. By

(e) Vide Part I. cap. 44. p. 529.

(f) This statute is to be taken strictly with relation to such goods, as are actually delivered to keep by the *master or mistress Dy. 5. a. b.* for as to other goods, it was a felony at common law, tho under the value of 40*s.* but where there was a delivery, the servant being in lawful possession, it could not at common law be a felony, vide Part I. p. 667. Otherwise therefore it is in the case of a lodger stealing goods or furniture belonging to his lodgings, because he is not intrusted with the possession, but only with the use, and therefore it was felony at common law; vide Part I. p. 506. however to obviate all doubt, it is enacted and declared by 3 & 4 *W. & M. cap. 9.* "That if

"an intent to steal, imbezzle, or purloin
"any chattel, bedding or furniture, which
"by contract or agreement he or they are
"to use, or shall be let to him or them to
"use in or with such lodging, such taking,
"imbezzelling, or purloining shall be to
"all intents and purposes taken, reputed
"and adjudged to be larceny and felony,
"and the offender shall suffer as in case of
"felony.

(g) But since our author wrote is taken away again by 12 *Ann. cap. 7.* from all persons, (except apprentices under the age of fifteen years, who shall rob their masters,) if the offense be committed in a dwelling house or outhouse.

(h) By 4 *Geo. 2. cap. 16.* the stealing linen, fustian, &c. from any whitening ground

VI. By the statute of 22 *Car. 2. cap. 5.* clergy is taken away from those that imbezzle or steal the king's stores (*i*).

VII. By the statute of 39 *Eliz. cap. 9.* clergy is taken away from offenses committed against 3 *H. 7. cap. 2.* concerning taking away and marrying or defiling of women in all cases, *viz.* upon attainder, conviction by verdict or confession, standing mute, challenging above twenty peremptorily, outlawry, not directly answering.

It extends to take away clergy in these cases from all principals and accessaries before the fact in express words, but not from accessaries after.

VIII. As to the statute of 28 *H. 8. cap. 15.* concerning piracy, robbery, murders and manslaughters upon the sea, it is enacted, "That for treason, murder, robbery, felonies and confederacies done upon the sea or in any places whereto that commission extended (*k*), the offenders shall not be admitted to have the benefit of clergy or sanctuary, but are excluded from the same (*l*)

Upon

grounds to the value of 10s. or buying or receiving the same, knowing it to be stolen is excluded from clergy with power to the court upon the circumstances of the case to transport the offender for seven years.

(*i*) *Viz.* in such manner as is forbid by 31 *Eliz. cap. 4.* whereby it was made felony: *vide Part I. p. 638.*

(*k*) It was a doubt upon this statute, whether an accessary at land to a felony or piracy at sea was included within the extent of the commission directed by this act, *Yelv. 134, 135.* but by 11 & 12 *W. 3. cap. 7.* (continued by 5 *Ann. cap. 34. 1 Geo. 1. cap. 25.* and made perpetual by 6 *Geo. 1. cap. 19.*) it is provided, "That accessaries to piracy before or after shall be tried and adjudged according to 28 *H. 8.* and shall suffer the same penalties and in like manner as the principals.

If a mortal stroke be given on the high sea, or on the shore at full sea, and the party die upon the shore at low water, this is not within this statute, nor shall the admiral have jurisdiction to try the offense, nor yet can it be tried at common law by a general commission of *oyer and terminer*: *vide supra. p. 20 & Part I. p. 426.* To remedy this inconvenience it is provided by 2 *Geo. 2. cap. 21.* "That where any person shall be feloniously stricken or poisoned upon the sea or any place out of *England*, and shall die thereof in *England*; or shall be feloniously stricken or poisoned at any place in *England*,

"and shall die thereof upon the sea or any place out of *England*, an indictment may be found in such county, where such death, stroke, or poisoning shall happen, against both principals and accessaries, and may be proceeded upon in the same manner as if such felonious stroke and death, or poisoning and death had happened in the same county, where such indictment shall be found.

(*l*) It was doubted, whether this statute of 28 *H. 8.* had not taken away the trial of these offenses before the admiral, or his lieutenant or commissary, which had occasioned a total disuse of such manner of trial to the encouragement of pirates, who could not be tried by this statute, unless (at great trouble and expence, brought to *England*, and therefore the aforesaid statute of 11 & 12 *W. 3. cap. 7.* provides, that they may be tried by the court of admiralty according to the directions of that act, which are there particularly mentioned.

By the same statute it is enacted, "That if any of the king's natural born subjects shall commit any piracy, robbery, or act of hostility against others the king's subjects, altho it be under colour of a commission from any foreign prince; or being a commander or master of a ship, or seaman shall feloniously run away with his ship, &c. or voluntarily yield up the same to any pirate,

Upon consideration of the statute of 1 *E. 6. cap. 12.* which in all cases not mentioned in that statute restores the privilege of clergy, as it was before 1 *H. 8.* it is said in *Poulter's case* 11 *Co. Rep. 31. b.* that thereby clergy is restored in case of piracy.

But upon consideration of both these statutes I think as followeth, *viz.*

1. *First*, That by the statute of 1 *E. 6. cap. 12.* in all other felonies (not particularly excepted by the statute of 1 *E. 6. cap. 12.*) that the common law takes notice of, clergy is restored by the statute of 1 *E. 6. cap. 12.* notwithstanding this statute of 28 *H. 8. cap. 15.* even for felonies within that jurisdiction or commission of the admiralty settled by that statute.

And therefore, if a man be slain below the bridges upon the river *Thames*, but not *ex malitiâ*, or if a larciny be committed there, that is within clergy, if committed upon the land, the party shall be admitted to his clergy by force of the statute of 1 *E. 6. cap. 12.*

2. *Secondly*, if such a felony were committed upon the high sea, that were not excepted by the statute of 1 *E. 6. cap. 12.* but should have had clergy by that statute were it upon the land, in such case, [370] tho the proceeding be by the statute of 28 *H. 8.* the party shall have his clergy, for the statute of 1 *E. 6.* is general, in all other cases of felony clergy shall be allowed as it was before 1 *H. 8.* and the exemption of clergy (*) was before that statute of 28 *H. 8.* extendible to the admiral's jurisdiction, as well as to courts of common law.

3. *Thirdly*, But as to piracy or robbery upon the sea by pirates and rovers I think clergy remains still taken away by the statute of

" or bring any seducing message from any
" pirate, enemy, or rebel, or endeavour
" to corrupt any commander, &c. to yield
" up or run away with any ship, &c. or
" turn pirate, or go over to pirates, or if
" any person shall lay violent hands on his
" commander to hinder him from fighting
" in defense of his ship or goods, or shall
" confine his master, or endeavour to make
" a revolt in his ship, every such person
" shall be adjudged a pirate, felon and
" robber.

By 8 *Geo. 1. cap. 24.* " All persons, who
" by 11 & 12 *W. 3. cap. 7.* are declared
" accessories to any piracy there mentioned,
" are declared to be principal pirates.

By the same statute it is provided, " That
" if any one shall trade with or furnish
" any pirate, &c. with provisions, &c. or

" shall fit out any ship or vessel with such
" design, or shall consult or correspond
" with any pirate, &c. knowing him to
" be such, or shall forceably board and
" enter any merchant ship on the high seas,
" or in any port, haven or creek, and
" shall throw over-board or destroy any
" part of the goods or merchandizes be-
" longing to such ship, such offender shall
" be adjudged guilty of piracy, and shall
" be tried according to the statutes of 28
" *H. 8. & 11 & 12 W. 3.* and being con-
" victed shall suffer as a pirate without
" benefit of clergy.

(*) *Viz.* the allowance of clergy; for our author here means by exemption of clergy the privilege of being exempted on account of clergy from punishment in the king's temporal courts.

28 *H. 8.* and is not restored by 1 *E. 6. cap. 12. (m)*, and the reasons are,

1. Because I take it before 1 *H. 8.* there was no clergy allowable for it at common law, for it was an act of hostility, and consequently is not touched by the statute of 1 *E. 6. cap. 12.*

2. Admitting that clergy were allowable in piracy before 1 *H. 8.* and taken away merely by the statute of 28 *H. 8. cap. 15.* yet clergy is not restored by 1 *E. 6.* therein, because it restores it only in *all other cases of felony*, which is intended only of felony, whereof the common law takes notice, but piracy is of another nature, and the common law takes not notice of it under the name of *felony*, and therefore a pardon of all *felonies* pardons not *piracy*: *vide Co. P. C. cap. 49. p. 112, 113.* and accordingly the use hath obtained in the proceedings of the commissions founded upon 28 *H. 8.*

IX. As to the statute of 33 *H. 8. cap. 12.* touching felonies in the king's household and proceedings thereupon before the lord steward there is a clause, that in case of manslaughter in the king's house tried before the lord steward, and also in all other felonies committed within the king's house, the offenders, the abettors, procurers, and receivers being convict shall suffer pains of death, as appertaineth to felons, without benefit of clergy.

In my opinion the statute of 1 *E. 6. cap. 12.* hath repealed [37¹] so much of this statute, as excludes from clergy such offenses as are not exempt from clergy by 1 *E. 6.* for these are felonies, that the law takes notice of, and such wherein clergy was allowable before 1 *H. 8.* and consequently the general words of that act restore clergy in these cases, tho the proceeding thereupon be before the lord steward by this act of 33 *H. 8. cap. 12.* for the words of 1 *E. 6. cap. 12.* are general in *all other felonies*, and they are in *materia favorabili*, in case of life, and in case of a privilege, which hath been ever favoured in law, and therefore shall be generally construed and not restrained by construction or interpretation.

See the references at the end of ch. XLIV. ante.

(m) As to those who shall commit any offense, for which they ought to be adjudged pirates, felons, and robbers by 11 & 12 *W. 3. cap. 7.* clergy is expressly taken away from such by 4 *Geo. I. cap. 11.* and

as no mention is made of such as were deemed pirates before that statute, it is an argument, that the law was taken to be, that they were ousted of clergy before.

C H A P. LI.

What persons are or are not capable of clergy.

I HAVE gone through the consideration of the *crimes* or offenses, wherein clergy is, or is not allowable; I now come to consider the *persons* that are, or are not capable thereof, admitting the crimes themselves within clergy.

Touching persons to be admitted to clergy, succession of times hath made great change in the law. Antiently *Nuns* professed were admitted to the privilege of clergy, tho they could not be priests, yet they are within the *privilegium* or *immunitas ecclesiæ*, and had their clergy, 22 *E. 3. Coron.* 461. but other women had not by the common law the privilege of clergy.

But at this day possession is abolished, and no woman admitted to the privilege of clergy at this day; only by the statute of 21 *Jac.*

[372] *cap. 6.* if a woman be lawfully convicted by verdict or confession of stealing goods under the value of 10*s.* and above the value of 12*d.* being such an offense, wherein a man might have his clergy, she shall for the first offense be burnt in the hand, and to be farther punished with whipping, sending to the house of correction, imprisonment, &c. as the judge shall in discretion think fit, this act hath continuance to this day by the statutes of 3 *Car. 1. cap. 4.* 16 *Car. 1. cap. 4. (a).*

Again by the statute of bigamy *cap. 5. (b)* *Bigamus* was ousted of clergy, 40 *Affiz.* 17. but by the statute of 1 *E. 6. cap. 12.* he is restored to the benefit of clergy, if the offense be within clergy, and tho *Stamf. Lib. II. cap. 46. fol. 134. b.* doubts whether that point of the statute be not repealed by the statute of 1 & 2 *P. & M. cap. 8.* whereby all statutes against the authority of the Pope or See of *Rome* are repealed, yet the law hath been sufficiently settled in this point, that *bigamus* hath his clergy at this day *T. 3 Eliz. Dy. 201. b. Lamb's case,* for by the statute of 1 *Eliz. cap. 1.* all the clauses in the statute

(a) But now upon the statute of 3 & 4 of *W. & M. cap. 9.* a woman convicted or outlawd for any felony, for which a man might have his clergy, shall upon praying the benefit of that statute be subject only

to such punishment, as a man would be in the like case, *viz.* be burnt in the hand and detained in prison at the discretion of the judge, not exceeding one year.

(b) 2 *Cq. Instit. p. 273.*

of 1 & 2 P. M. cap. 8. not specially excepted are repeald, and this is none of the excepted clauses, and so the statute of 1 E. 6. cap. 12, stands renewed by 1 Eliz. cap. 1. if at all impeached or repeald by 1 & 2 P. & M.

Again, at common law, if the clerk convict deliverd to the ordinary had broke the bishop's prison and been after taken, he had lost the benefit of his clergy, 22 E. 3. Coron. 257. but at this day that can never come in question, for by the statute of 18 Eliz. cap. 7. clerks convict are not now to be deliverd to the ordinary, but burnt in the hand and so discharged.

Again, antiently the law was held, that if the prisoner had not *habitu* & *tonsuram clericalem*, he should not have the benefit of clergy, 26 Affiz. 19. 20 E. 2. Coron. 233. or the ordinary might have refused him, tho he could read; but in process of time [373] that law was altered and the court would admit him to his clergy, if the case were within clergy, tho he had not *habitu* & *tonsuram*, if he could read, and tho the ordinary refused him upon that account. 9 E. 4. 28. b. 34 H. 6. 49. a. b.

A man attaint (*) of heresy, a Jew, or a Turk shall not have their clergy, but a person excommunicate shall have his clergy. 11 Co. Rep. 29. b. Poulter's case.

A Greek or alien, who knows not our letters, shall have his clergy, and shall read in the book of his own country. B. Clergy 20.

A bastard, a man blind shall have his clergy (c), if he can speak Latin congruously. B. Clergy 21, 22.

By the statute of 4 H. 7. cap. 13. "A man not within holy orders, "that hath once had his clergy, shall be burnt in the hand with "with M or T, and being after arraigned for any such offense, (*viz.* "an offense within clergy,) he shall not be admitted to his clergy a "second time. "And if any man upon a second arraignment for "such offense claim his clergy, as being a clerk in orders, if he "have not his letters of orders, or certificate of the ordinary witness- "ing the same, the justices shall by their discretion give him a day "to bring them, at which day if he fail, he shall lose his clergy that "second time.

(*) This should be *convict*, and so it is express in the authority here cited, *viz.* 11 Co. 29. b. for heresy wrought no attainder, altho by 2 H. 5. cap. 7. fee-simple lands were forfeited upon conviction.

(c) This is denied of a blind man, 11

Co. Rep. 29 b. & Broke in the place cited above makes a *quære* of it, because he can by no dispensation be a clerk in orders, *aliter* of a bastard, for he may be a priest by license.

Note no man shall be ousted of his clergy a second time by the bare mark in his hand, or by a parol averment without the record testifying it (+), and it seems, that if he deny he is the same person, issue must be joined upon it and tried to be the same person, before he can be ousted of clergy.

The orders, that come under the name of holy orders, were four, *viz. a bishop, a priest, a deacon, and a subdeacon*; other inferior orders, as *exorcistæ, lectores, acoluthi, &c.* were not called holy orders, but were called *clerici in minoribus*.

By this and some other instances, which appear in the statutes, it is evident, that the clergy in orders had a greater privilege allowed them than others.

1. A clergyman in orders in such cases, wherein clergy is ousted by the statute of 1 E. 6. cap. 12. as murder, robbery, &c. hath no more privilege than a layman, because the statute makes no exception or provision for him.

2. If a statute be made after 1 E. 6. ousting clergy generally, as the statute of 4 & 5 P. & M. cap. 4. 18 Eliz. cap. 7. a clergyman in orders hath no more privilege than another, for the statute provides not for him. *Stamf. P. C.* 135. b.

3. And therefore, tho the statute of 23 H. 8. cap. 1. and 25 H. 8. cap. 3. excluding clergy from those found guilty in petit treason, murder, robbery, &c. excepts such as are in the order of subdeacon, or any superior orders, and directs them to be delivered to the ordinary to remain in prison without purgation, or to be degraded, and then sent by the ordinary into the king's bench to be executed, it seems, that this privilege is at this day gone, 1. Because by the statute of 18 Eliz. cap. 7. all delivery of clerks convict to the ordinary is wholly taken away. 2. Because in all those cases, where clergy is ousted by the statute of 23 H. 8. clergy is ousted by the statute of 1 E. 6. cap. 12. (except burning of houses, and accessaries before the fact, which stand within clergy by the statute of 1 E. 6. cap. 12.) and in that statute there is no saving of any privilege for clerks in orders, as there is by 23 H. 8.

And then as to accessaries before the fact clergy is likewise generally taken away by the statute of 4 & 5 P. & M. cap. 4. without saving of more privilege to clergymen than to laymen.

(+) Or a transcript thereof, for the manner of certifying which see 34 & 35 H. 8. cap. 14. and 3 & 4 W. & M. cap. 9.

4. But as to the privilege of a second allowance of clergy, it should seem at this day, clergymen in orders shall have benefit of clergy, a second, third time, or oftener.

The statute of 28 *H. 8. cap. 1.* puts clergymen in orders under the same pains and dangers in relation to the statute of [375] 23 *H. 8. cap. 1.* 25 *H. 8. cap. 3.* as other persons not in orders; this takes away the privilege given by 23 *H. 8.* and 25 *H. 8.*

Then by the statute of 32 *H. 8. cap. 3.* which makes the former perpetual, it is farther enacted, “ That such persons as be within
“ holy orders, which by the laws of this realm ought or may have
“ their clergy for any felonies, and shall be admitted to the same,
“ shall be burnt in the hand as lay clerks be accustomed in such cases,
“ and shall suffer and incur afterwards all such pains, dangers, and
“ forfeitures, and be ordered and used for their offenses of felony to
“ all intents, purposes and constructions, as lay persons admitted to
“ their clergy be, or ought to be ordered or used by the laws and
“ statutes of this realm, any law or statute to the contrary notwithstanding.

This act was perpetual and subjected clerks in orders, notwithstanding the statute of 4 *H. 7. cap. 13.* to two inconveniences, *viz.* 1. To burning in the hand. 2. Exclusion of clergy a second time.

But then the statute of 1 *E. 6. cap. 12.* restores the privilege of clergy in all cases, (except those offenses contained in the statute of 1 *E. 6.* and expressly excluded from clergy,) as it was before 1 *H. 8.*

And altho by this statute of 1 *E. 6.* the burning of a clergyman in orders in the hand is not taken away by express words, yet he is restored to his clergy a second or other time, notwithstanding he had formerly his clergy and was burnt in the hand.

But altho in express words it restores not to clergymen in orders the exemption from burning in the hand given by 4 *H. 7. cap. 13.* yet it doth in equivalence, for it restores clergy in all other cases *in like manner and form, as it was before 1 H. 8.* which as to clergymen in orders was without burning in the hand, and accordingly to this day their privilege in that kind continues: *vide 2 Co. Inst. 637. Hob Rep. 294. Searle & Williams.*

And tis a mistake to say, that if he challenge above twenty, [376] he shall lose his clergy a second time, because the statute of 1 *E. 6.* in letting loose the clergy in other offenses mentions not that case,

case, for in case of challenging above twenty, there follows neither penance nor judgment of death, but only his challenge is overruled (*).

But indeed the case of outlawry is *casus omisus*, for tho in the clause excluding clergy the word *attainder* is in, which extends to an outlawry, yet in the second clause restoring clergy as it was before 1 H. 8. in other cases *attainder* and *outlawry* are omitted.

As to clergy of noblemen.

By the statute of 1 E. 6. cap. 12. “Peers of parliament committing felonies within clergy may pray the benefit of this act, and shall not be put to read, nor be burnt in the hand for the first offense, without any attainder or corruption of blood to be incurred thereby, and for the first offense shall be deemed, taken and used as clerks convicted, which make purgation, without any further privilege of clergy from henceforth at any time after for any cause to be allowed or admitted.

This privilege of peers to be discharged in this manner by this statute, 1. Must be prayed by them. 2. Extends to all cases, where a common person may have his clergy. 3. To all cases excepted from clergy by that statute, except murder and poisoning of malice prepense.

But it extends not 1. To felony put out of clergy by any subsequent statute. 2. Nor to felonies within this statute, where he cannot make purgation, as if he abjure, confess the felony, or be outlawd, by the opinion of *Stamf. P. C. fol. 130. a.* but this latter seems doubtful, especially at this day, when delivery to the ordinary and purgation are both taken away by 18 Eliz. cap. 7.

I think it was never meant, that a peer of the realm should be put to read or be burnt in the hand, where a common person should be put to his clergy, neither is it said, that he shall be discharged by his praying the benefit of this statute, where a common person [377] shall have the privilege of clergy and may make his purgation, but only where he may have the benefit of his clergy in the first clause of the statute, the other clause, (*shall be in case of a clerk convicted, that may make purgation,*) is only for his speedier discharge and farther advantage, and not to restrain the general clause.

(*) *Vide supra p. 270, 345.*

And therefore a great lawyer in the late times hath been much blamed for burning a peer of parliament in the hand, that confessed an indictment of manslaughter; and it was the only error of note, that the person erred in to my observation.

CHAP. LII.

At what time clergy is to be allowd.

ANTIENTLY the law was very unsettled in this point, till settled by subsequent acts of parliament and resolutions of the judges.

Before the statute of *Westm. 1. cap. 2.* the ordinary would challenge clerks as soon as they were indicted, nay sometimes, as soon as they were imprisoned (*), before they were indicted, as appears by the statute of *Marlbr. cap. 28. (a).*

By the statute of *Westm. 1. cap. 2.* it is provided, *Que quant clerke est prise pur rette de felonie & soit demand per l'ordinarie, il lui soit liuer solonque le privilege de Saint Esglise en tiel peril come il appent solonque le custome avant ces heures use,* and a direction given thereby to the ordinary, *Que ceux que sont endites de tiel rette per solemne inquests des probes hommes fait in le court le roy, en nul manner les deliverent sans due purgation, issint que roy n'ait mestier de* [378] *mettre autre remedy (b).*

After this statute the prisoner was not only to be indicted before clergy allowd, but many times inquisitions *ex officio* were taken (†). 1. Whether he were a clerk or no, and if not a clerk, he was not delivered to the ordinary. 2. Whether he were guilty or not, and if not guilty, he was discharged. 3. If found guilty, he was then delivered to the ordinary. *vide 2 Co. Inst. 164. 8 E. 2. Coron. 417. 17 E. 2. Coron. 386. 3 H. 7. 12. b.* but his goods were seised.

But this was found a great inconvenience to the prisoner, because in case of an inquest of office he lost his challenges, and besides possibly he might be quit of the felony, were he put upon the jury.

(*) *Vide Bract. Lib. III. f. 123. b.*

(a) *2 Co. Inst. 150.*

(b) *2 Co. Inst. 163.*

(†) *Vide Part I. p. 180. in notis. p. 343ⁱ in notis, & supra p. 318. in notis.*

And

And therefore in the time of *H. 6.* the court was changed by *Prisot*, and the prisoner hath been always since put to plead to the indictment, and if convicted, then to pray his clergy: *vide 3 H. 7. 12. b. Stamf. P. Co. fol. 131. a. 11 Co. Rep. Poulter's case.*

But if the prisoner will wave that advantage and will pray his clergy, he may, for no law ousts him of it, but then, if the indictment be out of clergy, he must answer to the felony, or he shall have his penance.

But at this day clergy is never granted, unless the party confess the felony, or be convicted by verdict.

If a man be indicted of a felony within clergy, and he plead and be convicted, and it be demanded of him, what he can say why judgment should not be given against him, he may pray his clergy, tho there be no ordinary to demand him, for as shall be said in this case, the ordinary is but the minister of the court, and it is not now, as antiently, used for the ordinary to demand a prisoner, but he may pray his clergy himself.

If in that case the ordinary demand not the prisoner, nor the prisoner himself prays his clergy, yet if it appear to the court, that he is
[379] a clerk, or be so named in the indictment or appeal, the court may, and it seems ought *ex officio* to allow him his clergy, but howsoever they thought not to execute him. *22 E. 3. Coron. 254. Abridg. Affiz. 74. (c).*

If by any mistake or oversight the court should give judgment against him, yet they may, (and as I think,) ought to allow him his clergy after his attainder.

And therefore the prisoner condemned shall in such a case be allowed his clergy under the gallows, if the judge come that way, *34 H. 6. 49. a. b.* This is agreed may be done by the judges of the king's bench, as justices of peace, because their commission continues, but it is doubted, how it can be done by justices of *oyer and terminer* after their session ended. *Crompt. Just. 119. a.*

And it is true, that tho they may allow clergy during the adjournment of their commission, yet they cannot do it after their session is over, but they may reprieve him after judgment, notwithstanding their session determined, upon consideration that he can read, and then may allow him his clergy as a clerk attaint at the next session. *3 & 4 Eliz. Dy. a.*

(c) This case is in *12 Affiz. 15.*

A. is indicted of a felony within clergy, and hath his book delivered him but cannot read, and the ordinary returns accordingly *non legit*, and it is entered of record *non legit*, and the court reprieves him till another sessions, and by that time he hath learned to read, tho the gaoler, that taught him to read in the mean time, was antiently punishable, yet he shall be admitted to his clergy and be delivered. 27 *Affiz.* 44. n. 11. *Dy.* 205. a. b. *per omnes justiciarios*, *Dy.* 214. b. *Stone's case.*

And the same law it is, if judgment of death were entered against him upon *non legit* returned, yet if he can read after, he shall be delivered to the ordinary and have his clergy *per omnes justiciarios*. 34 *H.* 6. 49. *Coron.* 20 (*).

If a man abjure the kingdom, (which is an attainder in law,) and come back again, he shall have the privilege of his clergy, as a clerk attaint. 8 *H.* 6. *Kelw.* 186. b. *Rast. Entr.* fol. 1. b.

But in antient time he was not delivered to the ordinary, but remanded to prison till he obtained the king's pardon for [380] returning into the kingdom without licence, and that being obtained he should be delivered to the ordinary, 1 *E.* 3. 16. b. *Coron.* 155. *Stamf. P. C. Lib.* II. cap. 50. but this law is antiquated: *vide Rast. Ent.* fol. 1. b. *ex T.* 15 *H.* 7. rot. 2.

If a man indicted of a felony within clergy stands mute, yet he shall have his clergy. *Moore's Rep.* n. 738. p. 550. *Winter's case*, yea tho judgment of *peine fort & dure* were given against him, if the case, as it appears upon the indictment, be within clergy, for the court in this case ought to be of counsel with the prisoner *in favorem vitæ*, tho he be wilful.

If the approver disavow his appeal, or be vanquished in battle, or become recreant therein, yet he shall have the privilege of clergy, if the cause, for which he is indicted, be within clergy.

But in these cases of attainder antiently they were delivered to the ordinary *absque purgation*. 15 *H.* 7. *Rast. Ent.* 1. b.

(*) These points cannot now come in question, for the necessity of reading is entirely taken away by 5 *Ann.* cap. 6.

CHAP. LIII.

Concerning the manner how, and the judge by and before whom clergy is to be prayed or allowd.

ANTIENTLY the ordinary took upon him, as the person that was to judge of the competency or incompetency of the clerk. But in truth the king's justices were the judges both touching the competency of the clerk to be admitted, and the sufficiency or insufficiency of his performance therein, and the ordinary was in truth but the minister to the court. 5 Co. Rep. 26. *b. case of ecclesiastical law (a).*

If the ordinary had challenged one as a clerk, that the court judged not to be such, the ordinary or bishop should be fined, and his temporalities seised, 7 H. 4. 41. *b. Stamf. P. C.* 132, 133, and the felon shall be hanged. 7 E. 4. 29. *a.* 9 E. 4. 28. *a.*

Again, if the ordinary refuse one that can read, and return *non legit*, yet the court may hear him, and if they judge him to read sufficiently, the prisoner shall be saved notwithstanding the refusal and return of the ordinary, and accordingly, if the ordinary be absent, the court may give him his book. 7 E. 4. 29. *a.* 9 E. 4. 28. *a.* 7 H. 4. 41. *b.* 34 H. 6. 49. *a. b. Stamf. P. C. Lib. II. cap. 45. fol. 132, 133.*

And therefore the judge may and usually doth appoint the verse, that the clerk shall read, *Stamf. P. C. ubi supra*, and therefore the practice of *Bryan and Starkey*, 21 E. 4. 21. is justly reprobable, who when they delivered a book to the prisoner and he read well in the presence of the justices, yet when the ordinary returned *non legit*, gave judgment of death against the prisoner, for in truth the ordinary is but the minister, or at most the assistant to the court, and not the judge. *Hob. Rep. p. 290. Searle & Williams (b).*

(a) *Vide Kel. 28. 51.*

(b) But this learning is now out of use, for by 5 Ann. cap. 6. every person convicted of a felony within the benefit of clergy shall, upon praying the benefit of

that statute, without any reading, be allowd to be, and be punished as a clerk convict, and this shall be as effectual and advantageous to him, as if he had read as a clerk.

C H A P. LIV.

Concerning the consequences of clergy granted or prayed.

THE consequences or effects upon clergy granted are considerable in two ways, 1. What they were before the statute of 18 *Eliz.* and 2. What since.

Touching the consequences of clergy before the statute of 18 *Eliz.* they were these.

I. Regularly when clergy was granted, there was an entry made by the court of king's bench, *Et tradito ei hic per curiam libro legit ut clericus, & J. S.* (the ordinary or his deputy,) *petit ipsum, ut clericum, præfato ordinario deliberari, ideo consideratum est, quod prædictus A. B. liberetur præfato ordinario.* And if it be without purgation, then there is this added, *salvo custodiend' absque aliquâ purgatione inde de cætero faciend' sub periculo, quod incumbit.* 17 *H.* 7. *Rot.* 2. *Rast Entries* 121. *a.* But if it be not without purgation, then that clause is omitted.

This is the form of the award in the king's bench, but before justices of gaol-delivery the entry commonly is, *Et traditur ordinario*, either generally or *absque purgatione*, as the cause requires. *M.* 2 & 3 *Eliz.* *Dy.* 205. *b.* & *ibid.* 215. *a.*

II. When he was so delivered to the ordinary, he was to remain in the ordinary's prison; *viz.* if committed generally, then he was to remain till he had made his purgation, if *absque purgatione*, then he was to remain there during his life, unless the king pardon him,

And if the clerk had broke prison, this was not a felony within the statute of 1 *E.* 2. *de frangentibus prisonam* (*); but if the clerk were attaint and delivered to the ordinary and broke prison and escaped, and were after taken, he should have been executed [383] upon his first attainder, *quod vide* 27 *Affiz.* 42.

But by the statute of 23 *H.* 8. *cap.* 11. if such a clerk break the prison of the ordinary and escape, this is made felony without clergy; only the clerk, if in orders, being convict was to be delivered to the ordinary without purgation, and he might, if he pleased, degrade him and send him into the king's bench with letters signifying his degra-

(*) Because that statute was construed to extend only to the king's prison: *vide Part I. p.* 608.

ding, and that court, have the record of the conviction before them, might give judgment and award execution, as if he had been a layman and found guilty before them.

But this among the rest of the felonies enacted in the time of *H. 3.* was repealed by 1 *E. 6. cap. 12.* & 1 *Mar. cap. 1.*

III. If the clerk were committed generally, he might make his purgation (*), the form whereof is unnecessary to recite, being it is now taken away by 18 *Eliz.* and is fully described and directed by *Stamford Lib. II. cap. 48. fol. 138.* and the statutes of *Westm. 1. cap. 2, 4 H 4. cap. 3.*

And if the ordinary would not admit a clerk to his purgation, a writ might issue out of the chancery to command it, where by law it might be done. 15 *H. 7. 9. a. per Fineux.*

And when he had made his purgation, he had always restitution of his *lands* seised, unless he were attaint. 8 *E. 2. Forfeiture 34.*

But as touching *goods* the difference was thus :

If before conviction upon his arraignment the prisoner had his clergy, (as was used commonly before the time of *H. 6.*) then if he made his purgation, upon signification thereof to the chancery he had a writ to the sheriff to restore him his goods, *nisi eā de causā fugam fecerit*, for then he had no restitution, *F. N. B. 66. a.* but if he died before purgation, his executors could not have it.

But if he had pleaded to inquest, and were convicted, then the goods were forfeited by the conviction, and he should not have restitution of his goods upon his purgation, and altho the law was taken antiently, that even in case of a conviction, unless there were an attainder also by judgment, he should upon his purgation have had restitution. 3 *E. 3. Coron. 365.* 40 *E. 3. 42 a.* yet of latter times the law hath constantly obtained otherwise, as appeareth 8 *H 4. 2. a. 20 E. 4. 5. B. Coron. 166. Plew. Com. 262. b. Stamf. P. C. Lib. III. cap. 23. vide 3 E. 3. Coron. 332.*

And the same law seems to be, if he come not *in* upon the *exigent* awarded, if he fled, if he stood mute, or challenged above thirty-five, for in all these cases he forfeited his goods, and should not have restitution upon his purgation, *vide 8 E. 2. Coron. 417.* where, tho he prayed his clergy before conviction, yet upon an inquest of office find-

(*) This was a trial before the ordinary by a jury of twelve clerks, wherein if he was acquit, he was discharged : if found guilty, he was degraded,

ing him guilty he forfeited his goods; the like *H. 17. E. 2. B. R. rot. 87. Heref.* in the bishop of *Hereford's* case before cited *cap. 44. p. 326.*

But if the clerk were delivered to the ordinary *absque purgatione*, there he continued prisoner during his life, unless pardoned by the king, and the king had not only his goods, as absolutely forfeited, but also the profits of his lands during his life, as appears by the books above cited.

And if the clerk were so delivered *absque purgatione*, if the ordinary went about to admit him to purgation, a writ might issue out of the chancery to prohibit him. *Claus. 22 H. 3. m. 17. dorso, Episcopo Exon. H. 14. E. 3. B. R. rot. 19. Lond'* and he shall for it be fined, and his temporalities seised for the contempt, and by some books it is an escape in the ordinary. *9 E. 4. 28. a.*

There were certain cases, wherein the clerk was delivered to the ordinary *absque purgatione*. 1. Where he was outlawed of felony *23 H. 8. cap. 1. Rast. Entries 121. a.* 2. Where he confessed the felony either upon his arraignment, or become an approver, or confessed and abjured and after came into the realm again, for against his own confession he should not be admitted to purge himself of the crime he confessed. *3 H. 7. 12 a.* 3. If he had judgment given against him, whereby he was attaint. *10 E. 3. Coron. 247.* 4. If he were in orders and broke the prison of the ordinary and made his escape, by the statute of *23 H. 8. cap. 11.* 5. Where a man in orders was convicted of any of the felonies ousted of clergy by *23 H. 8. cap. 1.* he was to remain during his life without purgation, and the ordinary might degrade him and send him into the king's bench to receive judgment. 6. If he were only convicted by verdict in an appeal, he should not make his purgation. *12 R. 2. Coron. 109. 10 E. 2. Coron. 247.* [385]

IV. If a felon had his clergy, regularly he was never to be arraigned again before the king's justices for the same felony, unless it were in case where he broke the prison of the ordinary and escaped. *20 E. 2. Coron. 232. (a).*

V. If a clerk had his clergy for felony, he was not to be arraigned for any other felony by him committed before his clergy allowed, for by the statute of *25 E. 3. cap. 5. pro clero*, it is enacted, "That he

(a) For in that case *ecclesia ipsum tueri non debet*, vide *Bracton, Lib. III. de coron. a.* f. 131. a.

“shall be arraigned of all his felonies at once (*b*),” yea and altho he only prayed his clergy, tho there be no entry of record, that he read or was delivered to the ordinary, yet by force of this statute he shall not be arraigned of any felony committed before, for the first felony being within clergy, and he praying his clergy, it was the fault of the court, that he had it not, which shall not turn to his disadvantage. *T. 4 Eliz. Dy. 214. b. Stone’s case.*

Yet this hath some exceptions, for if he had committed treason against the king before his clergy admitted, he may after his clergy and after his purgation also be indicted and arraigned for that treason, because it was an offense not within benefit of clergy.

VI. If he had committed a felony after he had his clergy, and was delivered to the ordinary, he should be put to answer that felony, *vide 4 Eliz. Dy. 214. b.* and if he had killed his keeper and thereby escaped of the ordinary’s prison, he should not for that felony have [386] had his clergy for it, *frustra legis auxilium quærit, qui in legem committit. 8 E. 2. Coron. 419. 22 E. 3. Coron. 250.*

The case of *Stone*, *4 Eliz. Dy. 214. b.* was this.

Stone committed two felonies the same day, one (suppose it burglary) out of clergy, the other (suppose it larceny) within clergy, he is indicted of the larceny, he pleaded and was convicted, and prayed his clergy, and entered *non legit ut clericus*, and no judgment, *quòd tradatur ordinario*, but is reprieved without judgment to another sessions, at which he is indicted of the other felony out of clergy, but supposed to be the same day when the former felony was committed, he is arraigned and pleads *non culp*, and is found guilty, & *petit librum & legit ut clericus, sed non crematur, neque traditur ordinario.*

1. It was agreed, that this second reading, notwithstanding the *non legit* first entered, is a good discharge of the first felony within clergy *per omnes justiciarios, Dy. 205. a. b.* but then, 2. The question was, what should be done as to the second not within clergy, whereof he was indicted and convicted: by seven justices he shall have judgment to die, because it shall be intended a felony committed after the first arraignment, but by other seven he shall be discharged, for it shall be intended a felony committed the same day, as it is laid, and tho there be no award, *quòd tradatur ordinario*, yet that was the act of the court

(*b*) This statute was only in affirmance of the common law, for he was to be degraded by the ordinary, and this was

thought a sufficient punishment for all offenses committed before degradation; *vide Bracton Lib. III. de coronâ, cap. 9. f. 123. b.*

and shall not prejudice him; but he shall be adjudged in the custody of the ordinary from the first prayer of his clergy.

But afterwards 28 *Maii* 8 *Eliz.* he was indicted for murder committed the first of *April* 1 *Eliz.* and was convicted and had judgment, and was executed, and yet that murder was before his clergy prayed, and before the statute of 2 *Eliz. cap. 4.* therefore it seems the former opinion obtained, for if he had been discharged by his reading as to the felony, whereof he was first indicted, he must have been discharged of all felonies committed before his first arraignment. The only salve that I can think of is either, 1. That he should have *pleaded* it, and did not; or 2. That the *legit ut clericus* must be intended to be applied to the second felony only, and not to the first, [387] whereupon *non legit* was entered. *Dy. 215. a.*

And thus far touching the effect of clergy, as it stood before 8 & 13 *Eliz.*

By these two statutes two great alterations were made in the whole business of clergy, which took away many of those intricate questions, tedious proceedings, and great inconveniencies, that were therein before this time.

1. By the statute of 3 *Eliz. cap. 4.* it is enacted, “ That every
“ person, which shall hereafter upon his arraignment for any felony
“ be admitted to the benefit of clergy by the laws of this realm, and
“ delivered to the ordinary for the same, and shall make his due purgation for the same offense or offenses, whereupon he was so admitted
“ to his clergy, and shall before his admission to his clergy have committed any other such offense, whereupon clergy by the laws or
“ statutes of this realm is not allowable, and not being thereof before
“ indicted and acquitted, convicted, or attainted, or pardoned shall
“ and may be indicted or appealed for the same, and thereupon put to
“ answer, and ordered and used in all things according to the laws
“ and statutes of this realm in such manner and form, as tho no such
“ admission to clergy had been.

By this statute, tho all other felonies within clergy before clergy admitted stand discharged, as they were at common law, yet felonies out of clergy committed before clergy allowed may still be prosecuted, notwithstanding clergy allowed, and so as to so much it repealed the statute of 25 *E. 3. pro clero, cap. 5.*

Then at the parliament of 18 *Eliz. cap. 7.* it is enacted, “ That
“ every person, which at any time hereafter shall be admitted and al-

“lowed to have the privilege of clergy, shall not thereupon be deliver-
 “ed to the ordinary, as hath been accustomed, but after such clergy
 “allowed, and burning in the hand according to the statute in that
 “behalf provided, shall forthwith be enlarged and delivered out of
 “prison by the justices, before whom such clergy shall be granted,
 [388] “that cause notwithstanding, provided, that the justices may
 “for farther punishment detain the clerk in prison for any
 “time not exceeding one year (*c*).

“Provided that, if any one shall be convicted of carnal knowledge,
 “and abusing a woman child under ten years, such offense shall be
 “felony without clergy.

“Provided, that any person admitted to the benefit of clergy shall
 “notwithstanding the same be put to answer other felonies, whereof
 “he shall be indicted or appealed, not being thereof before acquitted,
 “convicted, attainted, or pardoned, and shall in such manner be ar-
 “raigned, tried, adjudged, and suffer such execution for the same, as
 “he or they should have done, if as a clerk or clerks convict they had
 “been delivered to the ordinary, and there had made his or their due
 “purgation.

Upon this statute these points are clear.

1. That if before his clergy admitted, he had committed any other felony within clergy, he is cleared of them as well as of that whereupon he hath his clergy, for his burning in the hand is in lieu of his delivery to the ordinary and purgation.

2. That as to former felonies out of clergy he is not discharged by his admission to clergy, but shall be put to answer them.

3. That by his conviction he forfeits all his goods that he hath at the time of the conviction, notwithstanding his burning in the hand.

(*c*) By 5 *Ann. cap.* 6. it is enacted,
 “That where any person shall be convict
 “of larceny the judges shall award him to
 “the work-house or house of correction,
 “there to be kept without bail at the dis-
 “cretion of the judges, not less than six
 “months, nor more than two years from
 “the conviction, an entry whereof is to be
 “made on record, and if such offender
 “escapes he shall be committed to such
 “house there to remain not less than
 “twelve months, nor more than four
 “years.

By 4 *Geo.* 1. *cap.* 11. and 6 *Geo.* 1. *cap.* 23.
 “The court may order any person
 “convicted of larceny, or any felonious
 “stealing of money, &c. within clergy,
 “(except persons convict for receiving

“stolen goods, knowing them to be stolen,)
 “instead of being burnt in the hand or
 “whipt, to be transported to any of his
 “Majesty’s plantations in *America*, for
 “the space of seven years; and persons
 “convict for receiving stolen goods, know-
 “ing them to be stolen, or for offenses
 “without clergy, but pardoned generally
 “upon condition of transportation, to be
 “transported for the term of fourteen
 “years; and if any shall rescue or aid
 “such offender to make his escape, or if
 “such offender shall return or be found at
 “large without leave before the expiration
 “of his term in *Great Britain* or *Ireland*,
 “he or they shall be deemed guilty of
 “felony without clergy.

4. That

4. That yet by his burning in the hand he is put into a capacity of purchasing and retaining other goods, because the statute taking away delivery to the ordinary and purgation, which should have restored him to that capacity, gives him the capacity of purchasing and retaining other goods, and is in nature of a pardon.

5. That presently upon his burning in the hand he ought to be restored to the possession of his lands, and from thenceforth to enjoy the profits thereof.

6. That altho he be not burnt in the hand, but the king pardons it, he is thereby put into the same condition, as if he were burnt in the hand, and rendered a person capable now to purchase and retain goods, altho the words of the statute are *after clergy allowed and burning in the hand he shall be delivered*. These are all points resolved in 5 *Co. Rep.* 110. *a. Foxley's case*, and *P. 41 Eliz. Heston's case* therein cited (*).

7. And consequently after clergy and burning in the hand he shall not be proceeded against by the ecclesiastical judge to deprivation or other ecclesiastical censure, for it amounts to a pardon by the king. *Hob. Rep. p. 288. Searle & Williams*.

8. That notwithstanding this statute requires burning in the hand to discharge a clerk convict, yet a clerk in holy orders, *viz.* in the order of subdeacon or above shall not be burnt in the hand, but the privilege allowed them by the statute of 4 *H. 7. cap. 13.* to be saved from burning in the hand continues to them. 2 *Co. Inst.* 637.

9. And upon the same account they may have their clergy in cases within clergy a second time according to the statute of 4 *H. 7. cap. 13.* notwithstanding this statute.

10. That altho a clergyman in orders shall not be burnt in the hand, yet by virtue of the statute 4 *H. 7. cap. 13.* and of this statute after his discharge given by the court he shall have the same privilege as if he had been burnt in the hand, and therefore shall not be drawn in question in the ecclesiastical court to deprive him or inflict any ecclesiastical censure upon him. *Hob. Rep. 288. Searle & Williams*.

11. That notwithstanding this statute takes away delivery to the ordinary, and inflicts burning in the hand, yet the [390] privilege of peers of parliament exempting them from reading and burning in the hand for the first offense is not hereby at all diminished or altered.

(*) *Vide supra p. 278.*

12. That the plea of *auterfoits convict* and had his clergy stands as a good bar to a new arraignment for the same felony, as it did before this statute.

13. That if a man be indicted of murder, and upon not guilty pleaded is found guilty of manslaughter, and prays his clergy, tho he neither be burnt in the hand, nor hath his clergy allowed, but the court will advise upon it, yet this stands as a good bar to a new indictment or appeal for the same felony, for the prisoner hath done what he can in praying his clergy, which prayer is recorded *petit librum*, and it is the act of the court to advise, and their delay in allowing him clergy, or burning him in the hand shall not prejudice the prisoner. 4 Co. Rep. 45. b. Wigg's case and Holcroft's case adjudged. Co. P. C. cap. 57. p. 131. (d).

(d) This point was however much litigated, and at last solemnly settled in the case of *Armstrong and Lisle* T. 8 W. 3. B. R. rot. 565. Kel. 93. that a conviction of manslaughter, and that he was a clerk and

ready to read, if the court would have allowed him, is a good bar to an appeal, altho the court had not called the defendant to judgment, but continued him over with a *curia advisare vult*.

[391]

C H A P. LV.

Concerning judgments in the several kinds of capital offenses.

HAVING now gone through the preparatories to judgment, namely indictment, pleas, trial, and clergy, I come to consider of the judgments that are to be given in several capital offenses, and therein, 1. I will consider the several kinds of judgments. 2. Who are the judges, that may give them. 3. How and in [what manner.]

First, for the several kinds of judgments I shall consider these particulars.

1. What judgment is to be given in case of an acquittal of any capital offense.

2. What, when clergy is allowed.

3. What to be given against a person convicted of treason, as against the king.

4. What to be given in case of petit treason.

5. What, in case of felony.

6. What, in case of *peine fort & dure*.

I. The

I. The judgment upon the acquittal of the prisoner is either when he is acquitted by special plea, as of *auterfoits acquit*, or of a pardon, &c. or other matter in bar, or else when he is acquitted upon not guilty pleaded; and of these in their order.

If the prisoner pleads the king's pardon, the conclusion of his plea is ordinarily thus, *quarum quidem literarum domini regis (ac dicti brevis* if there be a writ of allowance also pleaded,) *prætextu prædictus T. H. petit quòd ipse de præmissis per curiam hinc dimittatur, &c. super quo visis & per curiam hinc intellectis omnibus & singulis præmissis consideratum est, quòd prædictus T. H. eat inde sine die, &c.* and in the margin of the roll there is commonly entered *literæ patentes allocantur: sine die, &c.* and no other judgment is usually entered in such case. *Rast. Entries 455. a. b.* [392]

If the prisoner pleads *auterfoits acquit*, or *convict*, or *attaint de mesme felony*, and avers it to be the same, (as he must,) the conclusion of his plea is, *& hoc paratus est verificare, unde petit judicium, & quòd ipse de præmissis per curiam hinc dimittatur*, and sometimes and most commonly pleads over to the felony not guilty.

Et David Waterhouse armiger. coronator & attornatus domini regis in curiâ ipsius regis coràm ipso rege, qui pro eodem domino rege in hac parte sequitur, pro eodem domino rege dicit & cognovit, quòd prædictus Johannes Sayer, qui modo comparet, & prædictus Johannes in inquisitione prædictâ nominatus per nomen Johannis Sawyer, nuper de W. in com. S. &c. est una & eadem persona, and so goes along to all the averments modo & formâ, prout prædictus Johannes Sayer superiùs placitando allegavit, super quo visis & per cur' hinc intellectis omnibus singulis præmissis tam in placito prædicto ipsius Johannes Sayer in formâ prædictâ placitat' & accordo convictionis prædict. quàm dicti domini regis attornati ejusdem placiti cognitione, consideratum est, quòd prædictus Johannes Sayer eat inde sine die H. 5 Jac. B. R. Sayer's case, where he pleaded auterfoits convict and had his clergy.

And judgment is in like manner entered, *H. 6. Jac. B. R.* in the case of Francis Smith upon *auterfoits acquit* pleaded, *Et David Waterhouse armiger, qui pro domino rege in hac parte sequitur, viso placito prædicti Francisci Smith & diligentèr per ipsum examinat' præmissis, pro eo, quòd evidentèr & manifestè apparet eidem David Waterhouse, quòd placitum prædictum per præfatum Franciscum superiùs placitatum &c. hoc non dedicit sed placitum illud ex parte dicti domini regis in omnibus fatetur, & cognovit fore verum: Ideò ut supra eat sine die.*

The

The like form of judgment, viz. *quòd eat sine die* was antiently used in case of *autrefoits acquit* pleaded. 2 E. 4. *John Hodgson's* case.

And note, this judgment of *eat sine die* is of two kinds, sometimes it is special, sometimes it is general.

[393] If *A.* bring an action of covenant against *B.* and a special verdict is found, but upon the perusal of the declaration a fault therein appears, *Et quia videtur curiæ, quòd narratio est insufficiens, consideratum est quòd querens nihil capiat per billam, sed quòd defendens eat indé sine die*, this judgment shall not be a bar in another action; because special, and not given upon the verdict, but upon the insufficiency of the declaration; otherwise it had been, if given generally, for it should have been intended upon the verdict and merits of the cause. T. 1650. *Eales & Lambert (a).*

In a *quare impedit* by the king issue is joined and found for the defendant, at the day in bank it is alleged in arrest of judgment, that no patron is named in the writ, the judgment shall be entered generally, *quòd eat sine die*, and not specially upon the plea in abatement, but it seems, it shall not bar the king in a new action, for the *eat sine die* shall be applied to the plea to the writ: vide 3 H. 4. 2 & 11. (b.)

But it seems, that if a man pleads a plea in bar of the indictment, as *autrefoits acquit*, or a pardon, yet if the indictment be insufficient, upon the reason of *Vaux's* case 4 Co. Rep. 45. a. the *eat sine die* shall be applied for the advantage of the king to the insufficiency of the indictment, and not to the plea in bar; *quære tamen, non obstante Vaux's* case.

It is reason to have the *eat sine die* special in that case, *eò quòd indictmentum prædictum apparet minus sufficiens, idèò consideratum est, quòd eat sine die*, and then it is applicable only to the insufficiency of the indictment.

(a) This case (but not this point) is reported in Styl. 37, 54, 73.

(b) This case, (which is obscurely stated by our author,) appears from the year-book to have been thus. A *quare impedit* was brought by the king, and a verdict past for the defendant, upon which the defendant prayed judgment, but the counsel for the king desired, that the writ might abate, because it was brought against the incumbent only, and not against the patron, but this was refused, because the king was estopped from abating his own writ; then they prayed, that if judgment were entered

against the king, the cause thereof should likewise be entered, but this also was refused by the court as needless, and the judgment entered generally, *quòd defendens eat sine die*, (the same judgment, that should be in case the writ had been brought against the patron and incumbent, and it had been found against the king,) because the king will receive no prejudice thereby, for if this judgment should afterwards be pleaded in bar, the king might reply, that judgment was given against the writ, because the patron was not named therein.

If a man plead not guilty and is acquitted, antiently the judgment was not only, *quòd eat sine die*, but *ideò consideratum est, quòd eat indè quietus*, tho it were at the king's suit, *quod vide Rast. Entries 51. a. 2 E. 4.* in the case of *Hodgson* before cited, and so in the case of *Smith* before cited, *viz. H. 6 Jac.* and accordingly *H. 3 Jac. B. R. Rast. Entries 57. Ideò consideratum est, quòd idem T. sit inde quietus, & eat sine die. Rast. Entries, fol. 385. Gaol-delivery 6, 7, 10, 11.*

Yet at common law without the aid of 18 *Eliz.* he might be bound bound to his good behaviour, if it were testified he was of ill fame, and shall be committed till he find sureties. *Rast. Ent. 385. Gaol-delivery 5.*

And if the entry were such, I do not think the prisoner could ever be arraigned again notwithstanding the insufficiency of the indictment, till that judgment of acquittal were reversed, for *eat inde quietus* cannot go to the insufficiency of the indictment, but must go to the matter of the verdict.

But indeed in *Vauxe's* case, 4 *Co. Rep. 44. a.* who was acquitted by verdict upon *not guilty* pleaded, the judgment is only *Ideò consideratum est, quòd prædictus Willielmus Vaux de feloniam & murthero prædicto in indictmento prædicto superius specificat. necnon de dictâ feloniam venenatione prædicti Nich. Ridley in eodem indictmento nominat. eidem Willielmo imposit. eat sine die*, not *eat inde quietus*: he was afterwards indicted *de novo* and pleaded the former acquittal, and yet because the indictment was not sufficient, he was put to plead to the felony, and had judgment and was executed.

The truth is the best reason to maintain that judgment is that, which is given by my lord *Coke P. C. 214.* in these words, *In the case of acquittal the judgment is, quòd eat sine die, which may be given as well for the insufficiency of the indictment, as for the party's innocence or not guiltiness of the offense, and the judges of the cause ought before judgment to look into the whole record, and upon due consideration thereof to cause it to be entered, ideò consideratum est, quòd eat sine die.*

This is the best reason to support that judgment, but if the judgment had been, *quòd eat indè quietus*, as the antient form is in case of acquittal upon *not guilty* pleaded, that could never refer to the defect of the indictment, but to the very matter of the ver- [395]
dict; and if in *Vaux's* case the judgment had been so entered, he could never again have been indicted for the same offense, notwithstanding the
the

the defect of the indictment, till that judgment reversed by writ of error, tho, as it was, that judgment in *Vauxe's* case was one of the hardest that ever I met with in criminal causes, for where the prisoner excepts to the insufficiency of the indictment, or the court doth it *ex officio*, the judgment is special, *quòd indictmentum ob insufficienciam cassetur*, & *quòd the prisoner eat indè ad præsens sine die*.

If a man be indicted of homicide *se defendendo*, or *per infortunium*, he must plead to it or confess it, and there is no judgment of death given against him, but *remittitur prisonæ*, or bailed *ad expectand. gratiam regis*.

But if a man by the coroner's inquest be found to have kild a thief, that assaulted him to rob him or to commit a burglary, which is not felony, he shall neither be arraigned nor put to answer upon that indictment, but shall be dismissed without any judgment.

But if he had been indicted of murder or manslaughter, and upon *not guilty* pleaded the special matter is found, or the jury acquits him, the judgment shall be *quod eat indè quietus*, and it is a perpetual discharge; and if he be found guilty *se defendendo*, yet the judgment given thereupon, *quod expectet gratiam regis* is a perpetual bar to another indictment. *Co. P. C. cap 101. p. 213, 214.*

II. The judgment in case of allowance of clergy is thus, *Super quo adiunc & ibidem quæsitum est per cur. domini regis de eodem Johanne, si quid pro se habeat vel dicere sciat, quare curia domini regis hic ad iudicium & executionem de eo super veredictum prædictum procedere non debeat; idem Johannes dicit, quòd ipse est clericus, & petit beneficium clericale sibi in cā parte allocari, & tradito eidem Johanni libro idem Johannes legit ut clericus, super quo consideratum est per curiam hic, quòd idem Johannes in manu suā lævā cauterizetur & deliberetur*, and the execution is accordingly entered, & *instantèr crematur in manu suā lævā, & deliberatur juxta formam statuti*.

[396] And if he be a nobleman, and be demanded wherefore judgment should not be given upon the verdict, he may aver, that he is a peer of the kingdom *habens locum & vocem in parlamento*, and pray the benefit of the statute of 1 E. 6. cap. 12. and if it appear so in the indictment, or in case it do not, if the court be ascertained thereof either by writ of *certiorari* to the clerk of parliament, or if it be confessed by the king's attorney, then the judgment is *ideò consideratum est quòd deliberetur secundum formam statuti in huiusmodi casu edit. & provis.*

And

And if it be alleged, that he is a clerk in holy orders, then it shall be entered after his reading, *Et quia curiæ hic constat per certificationem Episcopi, &c. or per literas testimoniales Episcopi, quod ipse est clericus in sacris ordinibus constitutus, viz. in ordine subdiaconatus, ideo considerat. est per curiam, quod deliberetur secundum formam statuti in hujusmodi casu edit. & provis. sine cauterizatione* And the like, if he plead the king's pardon of burning in the hand.

And if a layman pray his clergy, and it appear of record, that he had it before, then the entry is, *Et quia per inspectionem recordi coram domino rege hic missi &c. quod aliter idem J. S. indictatus existit &c.* setting out the effect of the record, *& quod ipse est eadem persona, & hoc idem J. S. non dedicit, ideo consideratum est, quod privilegium clericale eidem J. S. non allocetur, & quod suspendatur per collum quosque &c.*

And so if he prays his clergy, [and cannot read,] *Et tradito ei per curiam libro idem J. S. non legit ut clericus, ideo considerat' est, quod suspendatur per collum, quousque mortuus fuerit.*

III. The judgment in high treason against the king for conspiring his death, or levying war, or for a priest upon the statute of 27 *Eliz. cap. 2.* or for any new treason made by authority of parliament is in this manner.

First the king's serjeant or attorney *juxta debitam legis formam petit versus ipsum E. D. super veredict' prædict' judicium & executionem pro dicto domino rege habend.' &c.* but this is not of absolute necessity, for the court *ex officio* ought to give judgment.

Et super hoc visis & per curiam hic plenius intellectis omnibus & singulis præmissis considerat' est, quod prædictus E. D. [397] ducatur per vicecomitem com' Middlesex, or per marescallum hujus curiæ, or per constabular' turris London usque marescalciam &c. or usque turrim London, or usque gaolam domini regis com' prædicti (according as the prisoner is in custody,) Et de inde per medium civitatis London directè usque ad furcas de Tiburne trahatur, & super furcas illas ibidem suspendatur, & vivus ad terram prosternatur, & interiora sua extra ventrem suam capiantur (c) ipsoque vivente (d) comburantur, & caput ejus amputetur, & corpus ejus in quatuor partes dividatur, & caput & quateria illa ponantur ubi dominus rex ea assignare voluerit.

(c) *Secreta membra amputentur* is here sometimes inserted, *Show. cases in parliament p. 187.* but it is not of necessity, vide the sentence in lord *Derwentwater's* case, *Stat. Tr. Vol. VI. p. 16.*

(d) These words *ipsoque vivente*, or others tantamount are absolutely necessary, otherwise the judgment is erroneous. See 2 *Salk. 632. Show. cases in parliament p. 127. Rex versus Walcot.*

But if the prisoner be in the king's bench and the judgment be given in that court, the entry is *quòd prædictus J. S. ducatur per prædictum marescallum usque prisonam marescalciæ domini regis coram ipso rege, & de inde ad quendam locum executionis, vocat. St. Thomas Watringes, trahatur, & supra furcas ibidem suspendatur*, and so forward as in the judgment.

Thus the judgment was entered against *Barkly* a feminary priest upon an indictment in *Middlesex*, *P. 38 Eliz.* upon the statute of *27 Eliz.* But the judgment against a woman in all cases of high treason is to be drawn and burnt. *Co. P. C. 211.*

Upon an indictment of treason for counterfeiting the king's coin the judgment is only, as in petit treason, *viz. quòd ducatur usque goalam domini regis de Newgate per vic' com' Middlesex, & ab inde usque ad furcas de Tiburn trahatur & ibidem suspendatur, quousque mortuus fuerit.*

And the judgment against a woman is also, as in petit treason, to be burnt. *25 E. 3. 42. (e).*

This is agreed of all hands, but as to clipping or impairing of coin [there hath been some doubt,] and likewise as to counterfeiting of foreign coin made current by proclamation, because these are new created treasons. *Co. P. C. p. 17.*

But yet in cases of clipping or washing made treason by [398] the statute of *5 Eliz. cap. 11. & 18 Eliz. cap. 1.* the judgment is now settled to be only drawn and hanged, as in case of counterfeiting of the coin of the kingdom by *25 E. 3. de prodicionibus*, and this was agreed, and accordingly judgment given against two Frenchman, *Hill*, *25 Car. 2. (f)*, according to the book of *T. 6 Eliz. Dy 230. b.*

And with this agrees the resolution of *24 H. 8.* in justice *Spilman's* reports cited *2 Co. Inst. p. 636.* A priest drawn and hanged for clipping the king's coin, and yet clipping was not held to be treason within the statute of *25 E. 3.* but made so [by the statute of *3 H. 5. cap. 6.* according to the common opinion and the recital of the statute of *5 Eliz.*] *(g)*, and so repealed by the statute of *1 Mar. cap. 1.* yet even while that statute of *3 H. 5.* was in force, the judgment was only drawing and hanging in that case.

(e) *N. Edit. 85. b.*

(f) *Bellew & Norman, 1 Ven. 254.*

(g) In the original MS. the words in this place are, *By the statutes of 5 & 18 Eliz. according to the common opinion and the*

recital of those two statutes: but it appears by what follows, that the statute of *3 H. 5.* was intended here to be mentiond, nor is it recited in the statute of *18 Eliz.* but only in that of *5 Eliz.*

And upon search of precedents both in the king's bench and at the *Old Baily*, tho some precedents were of hanging drawing and quartering for clipping, yet the most usual were only drawing and hanging (*h*).

And upon the same reason I think, that in case of counterfeiting of foreign coin made current by proclamation, made treason by the statute 1 *Mar. cap. 6.* and the clipping or washing thereof, likewise made treason by 5 and 18 *Eliz.* I think there ought to be no other judgment but drawing and hanging, for by the proclamation and the act of 1 *Mar.* it is now become as the coin of this realm, and it were an incongruous thing for a man to be hanged and quartered for counterfeiting foreign coin made current by proclamation by interpretation of the statute of 1 *Mar.* and yet to be only drawn and hanged for counterfeiting the proper coin of the kingdom.

For counterfeiting the great or privy seal certainly there was antiently no other judgment but that of petit treason, namely drawing and hanging, as appears by the book of 2 *H* 4. [399] 25. *a. (i)*, and the record of that case, tho my lord *Coke* excepts against it in *P. C. p. 15. sed de his vide quæ supra dixi Part I. cap. 16. p. 187.*

IV. The judgment in petit treason is for a man to be drawn and hanged, for a woman to be drawn and burnt, as also in high treason, *Co. P. C. p. 211.* for the other judgment is unseemly for that sex. *Stamf. P. C. Lib. III. cap. 19. fol. 182. b.*

V. The judgment in all cases of felony is, *quòd suspendatur per collum, quousque mortuus fuerit.*

But if a man be outlawd of treason or felony, tho there be no other judgment, but *utlegatus est per judicium coronatorum*, yet it is of itself an attainder and subjects the offender to an award thereupon to be made by the court, where he is brought, as is suitable to the offense, for which he is indicted and outlawd.

And this judgment is as well to be given against a nobleman as another in case of felony, and cannot be given otherwise by the court, or executed otherwise by the sheriff. *Co. P. C. p. 211 & 52. (k).*

VI. The judgment of *peine fort & dure* at this day in case of felony is only where the prisoner stands mute of malice upon his arraign-

(b) *Vide Part I. p. 352.*

(i) *Clement Peytenin's case, vide Part I.*

p. 181. in notis, & p. 352.

(k) *Vide Part I. p. 501.*

ment or will not directly answer, for upon challenging above twenty his challenge shall be only over-ruled (l), and the trial proceed.

But at common law in all cases of felony and at this day in petit treason, if he challenge thirty-six peremptorily, he should have his judgment of penance (m), and this holds as well in an appeal as in an indictment, and as well in case of women as men. 2 Co. Inst. 177. *super stat. Westm. 1. cap. 12.*

The entry of the judgment is thus :

Et quæsitum est per curiam ab eo qualiter se velit inde acquietare, qui dicit, quòd ipse non vult se super aliquam juratam patriæ ponere, nisi solummodo in Deum; tunc insuper dictum est ei per curiam hîc, quòd nisi
 [400] *aliter in hâc parte respondeat mori debet, qui dicit, quòd non vult aliter respondere in hâc parte nisi ut prius, ideò considerat est, quèd idem R. B. ducatur ad prisonam marescalciæ domini regis coram ipso rege, & ibidem nudus præter baccas suas ponatur ad terram super dorsum suum directè jacens, & foramen in terrâ sub ejus capite fiat & caput ejus in eodem ponatur, & super corpus suum ubi libet ponatur tantum de petris & ferro, quantum portare potest & plus, quamdiu vivit, & quòd habeat de pane & aquâ pessimis & prisonæ ei proximis, & illâ die quâ comedit non bibat, neque illâ die quâ bibit non comedat, sic vivendo quousque mortuus fuerit (n).*

And if he stands wholly mute, then the entry is thus :

Et allocutus quommodo se velit de felonîâ prædictâ acquietare, qui quidem R. nihil respondet, sed se mutum tenet, & super hoc captâ inquisitione per sacramentum 12 &c. si prædictus R. loqui possit, vel si prædictus R. prædicto die &c. loquutus fuerit necne, qui dicunt super sacramentum suum, quòd prædictus R. loquutus fuit isto eodem die & benè loqui potest si velit, ideò idem R. ut ipse qui legem recusat, hoc eat ad pœnam &c. ut supra. Catalla ipsius nulla.

And sometimes also the jury were charged to inquire *si malè credatur*, but that was but rarely in case of an indictment (o), for the indictment itself carries a probability, that he may be guilty when joined with his own wilful refusing his trial, so that he forfeits his goods by such standing mute.

VII. Judgment in petit larciny is only to be whipt, or imprisoned by way of chastisement (p).

(l) *Supra p. 270, 314.*

(m) *Supra p. 268, 316.*

(n) *Vide supra cap. 43. p. 319. Rast. Entr. fol. 385. pl. 2.*

(o) *Vide the case of Thomas de la Hetbe su-*

pra p. 322. in notis.

(p) But by subsequent statutes the offender may be transported. See 4 Geo. 1. cap. 11. and 6 Geo. 1. cap. 23. *vide supra p. 388. in notis.*

VIII. Judgment in misprision of treason is forfeiture of all his goods, forfeiture of the profits of his land during his life, and imprisonment during his life (*q*).

IX. Judgment in theftbote is fine and imprisonment.

⁴ Blackf. Com. ch. 29. per tot. ² Hawk. P. C. ch. 48.

(*q*) Part I. p. 374.

CHAP. LVI.

[401]

Concerning giving of judgment, by whom, and when.

WHAT courts have jurisdictions in causes criminal and capital have been handled before in the beginning of this Part; I am now to consider when one judge may give judgment upon a conviction before another judge, and how.

The king's bench is the center of all subordinate jurisdictions, especially in matters capital.

If *A.* be indicted of felony before justices of peace, *oyer* and *terminer*, or gaol-delivery, and be convicted by verdict or confession, if the record of the conviction be removed into the king's bench by *certiorari*, and the prisoner also be removed thither by *habeas corpus*, that court may give judgment upon that conviction, but there must be first a filing of the record in the king's bench, and a commitment of the prisoner to the custody of the marshal, and he must be called to say what he can, why judgment should not be given against him, and thereupon judgment may be given: *vide* 23 H. 8. cap. 1 & 11. 10 H. 4. 9. a. *Coron.* 467.

And indeed there was no other remedy before the statutes of 11 H. 6. cap. 6. & 1 E. 6, cap. 7. for judgment to be given upon persons reprieved before judgment, for the former commissions are determined by new ones at common law.

But if the conviction were not before the judge of the king's bench, so that the offender continued not always in custody of the marshal or of those that are his bail, but be removed by *habeas corpus* or brought in by process, the party so removed may plead he is not the same person and give some diversity of name, and if the king's attorney

confess it, he shall be discharged and process made out against the other person, thus it was done in the case of *John Apere*, *Lib. placitor' Coron. n. 7.* who was taken upon a *capias utlegat'* and pleaded he was not the same person.

Or the king's attorney may take issue upon it and aver him to be the same person, and known by one name or the other. 21 *E. 4. Surry. Lib. placitor' Coron. placito 31. Nicholas Browne's case.*

Or if he answers nothing but stands mute, it shall be inquired whether he be the same person by inquest, before judgment be given against him, for he shall not be concluded by the return of the sheriff either upon a *cepi corpus* or *habeas corpus*, if he was not always in custody of the same court from the time of his first arraignment, *vide accords 10 E. 4. 19. b.* but if he had been always in custody of the court of king's bench from the time of his arraignment, or had been bailed by the court, and came in and rendered himself upon his bail, then no such inquiry shall be made upon his standing mute. 10 *E. 4. 19. b.*

And that I may say it once for all, the same law is where a party is outlawd or abjured, and comes by *capias utlegat'* or other process into the king's bench, he shall be demanded what he can say why execution should not be awarded against him upon the record removed, which 7 *H. 6. 25. a. B. Coron. 44.* is called an arraignment; if he confess himself to be the same person, execution shall be awarded; if he deny himself to be the same person and the king's attorney confess it, he shall be discharged; if the king's attorney take issue upon it, it shall be tried; if the prisoner say nothing, it shall be inquired by an inquest of office whether he be the same person: *vide 8 H. 4. 3 & 18. B. Coron. 22, 23. 10 E. 4. 19. b. M. 5 Car. Croke, p. 176. Cox's case.*

If an issue be joined in the court of king's bench in an appeal of felony, or in an indictment of treason or felony either upon a record originally begun in that court, or removed thither by *certiorari*, the usual course now is to try it at the bar, or if it were removed by *certiorari* out of another county, to remit the record according to the statute of 6 *H. 3. cap. 6.* to the justices, before whom such
 [403] indictment was originally taken, with a writ to command them to proceed therein, whether the record was so remitted before or after issue joined in the king's bench.

But

But many times that court antiently did, and at this day may send down the transcript to be tried by *nisi prius*, as well in an indictment as an appeal, and upon the return thereof the court may give judgment of death or acquittal, according to the verdict returned: *quod vide sæpius L.*

But whether they might inquire of abettors there hath been diversity of opinions, *vide 2 & 3 P. & M. Dy. 120, 121, 131. b.* but by the better opinion they cannot, *10 E. 4. 14. b. 4 Co. Inst. 160.* nor can they arraign the felon at the suit of the king, if the plaintiff be nonsuit in his appeal *22 E. 4. 19. a. (*)*.

It hath been held by some, that justices of assise and *nisi prius* may by virtue of the statute of *27 E. 1. de finibus cap. 3.* without any other commission deliver the gaol and give judgment of felons, *vide Stamf. P. C. Lib. II. cap. 45. fol. 57. b.* but yet that hath not been used, neither is it safe to be practised without a commission of gaol-delivery: *vide stat. 3 H. 5. stat. 2. cap. 7.*

But certainly at common law justices of *nisi prius* could not give judgment upon an appeal or indictment sent to them out of the king's bench by *nisi prius* to be tried, no more than in other ordinary civil causes, for they have but the transcript of the record before them, and their commission is only *ad triandum exitum*, and to remit the transcript with the verdict indorsed upon the *postea* (†).

But by the statute of *14 H. 6. cap. 1.* justices of *nisi prius* have power in all cases of felony and treason to give judgment of acquittal or attainder at the day and place where their inquisitions, inquests, and juries are taken, and then and there to award execution to be made by force of the same judgments.

But yet it seems this statute gave them not power to inquire of abettors in an appeal, nor to arraign the prisoner upon a nonsuit before them at the king's suit, *10 E. 4. 14. b. 22 E. 4. 19. a.* but this was to be done in the king's bench upon the return of the *postea*. [404]

But upon this statute these things are to be observed.

1. That they might return the *postea* into the king's bench, and there, judgment may be given as at common law, for tho the statute gives them power to give judgment and award execution, yet it leaves them power to return the *postea*, and takes not away the power of the

(*) *Vide supra p. 41.*

(†) *Vide supra p. 40.*

king's bench to give judgment and award execution upon the *postea* returned, as they might have done at common law.

2. That as the prisoner cannot be arraigned nor plead to issue in the king's bench, unless the record and also the prisoner be there, so the record itself still remains in the king's bench, and only the transcript delivered to the judges of *nisi prius* and not the record itself, as upon the statute of 6 H. 8. yet upon that transcript the judges of *nisi prius* may give judgment and award execution by virtue of the statute of 14 H. 6. cap. 1.

But then the prisoner must either be sent down by *habeas corpus* to the sheriff of the county, where the *nisi prius* is, in custody, or else bailed to appear there, for no inquest can be taken by default, or in the absence of the prisoner in cases capital.

And if the prisoner be bailed by the king's bench to appear at the *nisi prius*, (as he may,) yet if he appear not, the inquest cannot be taken, but only the prisoner called upon his bail, and the default recorded, and so upon the return of the *postea* new process against the prisoner, and also against his bail.

At common law by granting a new commission of the peace all proceedings before former commissioners of the peace were discontinued, and if an issue were joined, or a person convicted, or had judgment, the new commissioners could not proceed to trial, judgment, or execution, but all that could be done was to remove the record by *certiorari* and the prisoner by *habeas corpus* into the king's bench, and there to proceed where the justices left off.

[405] And to remedy this the statute of 11 H. 6. cap. 6. was made, whereby it is enacted, " That such proceedings shall
 " not be discontinued by such new commission, but the new justices
 " after they have the records before them shall have power to con-
 " tinue the same pleas and processes, and the same pleas and pro-
 " cesses and all that depend upon them to hear and finally determine,
 " as the other justices might have done, if no new commission had
 " issued.

By virtue of this statute new commissioners might not only give judgment upon conviction before former justices of peace, but might award execution upon judgments given by the former justices, as shall be farther shewn.

But this statute extended not to commissions of *oyer and terminer* and gaol-delivery, but only to commissions of the peace.

And

And therefore the statute of 1 *E. 6. cap. 7.* was made, which among other things enacts, “ That where any person shall be found guilty of
 “ treason or any felony, for which judgment of death should be given,
 “ and be reprieved before judgment, new commissioners of gaol-delivery may give judgment upon such conviction, as the justices of
 “ gaol-delivery, before whom he was convicted, might have done.

“ And that no manner of process or suit made, sued, or had before
 “ any justices of assize, gaol-delivery, *oyer and terminer*, of the peace,
 “ or other the king’s commissioners shall in any wise be discontinued
 “ by the making and publishing any new commission or association,
 “ or by altering the names of such justices or commissioners, but that
 “ the new justices of assize, gaol-delivery, and other commissioners
 “ may proceed in *every behalf*, as if the old commission and justices
 “ and commissioners had still remained and continued not altered.

Tho this statute in the first part thereof mentions giving of judgment upon a person convicted, yet I take it very clear they may award execution upon a party reprieved after judgment by former commissioners, for by the second clause they may proceed in *every behalf* as the former commissioners might have done, and therefore there is little cause for the *quære* made touching that point in *Dyer* (g), [406] yet I have generally observed this one rule, that I would never give judgment, or award execution upon a person reprieved by any other judge but myself, because I could not know upon what ground or reason he reprieved him (h)

See the references at the end of the ch. next *supra*.

(g) *Dyer fol. 165. a.*

(b) The usefulness of this caution may be seen from what is observed by Sir John Hawles in his remarks on *Cornish’s* trial, *State Tr. Vol. IV. p. 203.* where he relates the case of some persons, “ Who had been
 “ convicted of the murder of a person
 “ absent barely by inferences from foolish
 “ words and actions; but the judge before
 “ whom it was tried was so unsatisfied in
 “ the matter, because the body of the

“ person supposed to be murdered was
 “ not to be found, that he reprieved the
 “ persons condemned; yet in a circuit
 “ afterwards a certain unwary judge, without inquiring into the reasons of the
 “ reprieve, ordered execution and the
 “ persons to be hanged in chains, which
 “ was done accordingly; and afterwards
 “ to his reproach the person supposed to
 “ be murdered appeared alive.

C H A P. LVII.

Concerning executions.

MUCH of what concerns this matter hath fallen in under the former chapter, and therefore I shall be brief in it. I shall consider.

1. Who may award execution.
2. In what manner it is to be awarded.
3. By what warrant to be made.
4. By whom it is to be done.
5. In what manner.
6. Concerning reprieves or respite of judgment or execution.

I. As to the first of these it hath been dispatched in the former chapter, they that may give judgment may award execution.

And therefore the court of king's bench upon *habeas corpus* and a *certiorari* to remove the body of a prisoner and the record of his outlawry or attainder before them may award execution upon
 [407] him. *M. 5 Car. B. R. Croke p. 176. Coxe's case, vide quæ dicta sunt supra cap. 56.*

II. Touching the manner of it there be certain cases, wherein tho the prisoner be attainted, yet he is not to have execution awarded against him, till he be demanded what he can say why execution should not be awarded against him, *viz.*

1 Where a woman is convicted and attaind by judgment, tho she remains always in custody, so that *constat de personâ*, yet execution is not to be awarded against her till she be demanded what she can say why execution should not be awarded, for she may allege pregnancy, which, tho it be no cause to respite judgment, is a good cause to respite execution.

2. Where the judgment was given at a former session, for in that interval between this and the former session he may have a pardon to plead.

3 Where the prisoner hath not always remained in the custody of the court, where he first had judgment, for in that case, if he be brought in by a *capias* by the sheriff, he shall not be concluded, but
 that

that he may say he is another person, and issue may be taken upon it, and that issue shall be tried before he shall have execution awarded against him, and if he stands mute, it shall be inquired whether it be of malice. 10 E. 4. 19. b. Again,

4. If judgment were given in another court, or by other justices, as in case where a record of an attainder comes from another court by *certiorari* into the king's bench, or if a man be outlawed for felony, and the outlawry either removed or returned into the king's bench, and the felon brought in by *habeas corpus* or *capias utlegat'* he shall be demanded what he can say why execution should not be awarded against him, which 7 H. 6. 25. a. is called an arraignment, for in these cases, 1. He shall not be concluded by the return of the sheriff from saying he is not the same person that was outlawed, and upon that, issue may be joined, and it shall be entered of record and tried (*), unless the king's attorney confesseth it: *vide supra cap. 56.* 2. He may have the king's pardon to plead. 3. In case of an outlawry he may assign error in the outlawry, and pray res- [408] pite to purchase a writ of error, and the court usually in such a case prefixeth him a day, and gives him respite to purchase a writ of error, and in the mean time remits him to the marshal and respites his execution.

Thus it was done in the case of *David Dene*, H. 16. E. 4. *Placit. cor. n. 57.* who was taken by a *capias utlegat'* returnable in the king's bench, *Et statim quæsitum est ab eo, si quid pro se habeat vel dicere sciat, quare ad executionem de eo super utlegariâ prædictâ procedi non debet.*

He alleged, that at the time of the outlawry pronounced he was in prison in the tower of London, *Et statim quæsitum est ab eo per cur' si habeat aliquid breve de errore necnè, qui dicit quòd non; idèò injunctum est eidem David ex gratiâ per curiam, quòd ipse breve de errore in hac parte habeat coràm domino rege in octabis Hillarii*, and upon his failure a second and a third peremptory day was assigned him, at which day he shewed to the court a writ of error and assigned the same error in fact, and issue was taken upon it, and a *venire facias* returnable in Mich. term, the prisoner still remaining in custody, and execution respited till the issue tried.

But it is to be noted, that he that will delay his execution by alleging error in the outlawry and praying liberty to purchase a writ of error, must allege error in fact, or error in law upon the outlawry to obtain

(*) *Kel. 13.* The case *Barksted, Okey and Corbet.*

that respite of execution before his writ of error be brought, for if the court be satisfied, that it is merely a pretense, they may chuse, whether they will allow him a day to sue forth a writ of error, but may award execution presently. 1 H. 7. 13. b. *John Collin's case*, vide *Co. P. C.* p. 212.

If either the prisoner himself, or any as *amicus curiæ*, inform the court of any error in the outlawry, the court *ex officio* must prefix him a day to purchase his writ of error, and in the mean time respite execution, but if he purchase not his in convenient time, execution shall be awarded.

III. By what warrant the execution is to be made.

[409] In the king's bench there is no other writ nor warrant but an award of the court upon the judgment, viz. *Et dictum est marescallo, quod faciat executionem periculo incumbente*, for in the king's bench the marshal is the immediate officer of the court to make execution in these cases, for that court never gives judgment against any, that is not *in custodia marescalli* in cases capital, and so are all the ancient and modern precedents, vide 3 H. 7. 7. a. M. 5 Car. B. R. Cro. p. 176. *Coxe's case*, and so was directed by the court upon view of the precedents themselves mentiond in my lord *Coke's* book of *Entries*, *Tit. Indictment per totum*, P. 25 Car. B. R. in *Brown's case* (a).

When an attainder of felony or treason is against a nobleman, the judgment is pronounced by the lord high steward, and the warrant for execution is under his precept and seal in his own name. *Co. P. C.* p. 31.

When judgment is given by commissioners of *oyer and terminer*, regularly the precept for execution should issue to the sheriff in the names and under the hands and seals of three of the commissioners, whereof one to be of the *quorum*, before whom judgment was given, *Co. P. C.* p. 31. but by usage (as far as I can learn of late times,) it is now done only by leaving a calendar with the sheriff declaring their judgments (*).

When a man hath judgment of death before justices of gaol-delivery, the regular way is, either to issue a precept to the sheriff, in the names of the commissioners, reciting the judgment, and commanding execution to be done, or otherwise by an award upon the record, *Et dictum est per curiam hinc vicecomiti comitatus prædicti, quod faciat executionem periculo incumbente*.

(a) 3 Keb. 193. 1 Vent. 243.

(*) *Supra* p. 31.

But of latter time there is no more done, but after judgment entered the judge subscribes a calendar in paper, directing the several judgments of deliverance of the parties acquitted, or the execution of the parties condemned.

Only *Rolle* would never subscribe any such calendar (*), but would command the sheriff openly in court to take notice [410] of the judgments and orders of what kind soever, and command the sheriff to execute them at his peril.

The reason of the difference between justices of gaol-delivery and of *oyer and terminer* is this; all the precepts, that issue at a sessions of *oyer and terminer*, as for a *venire facias tales*, &c. ought in true order of law to be by precept in the names and under the seals of the justices, but the precepts by justices of gaol-delivery need not be otherwise than by a simple award upon the roll: *Ideo præceptum est vicecomiti, quod venire faciat hic* &c.

IV. By what officer execution is to be made.

Regularly the officer, that is to make the execution, is that officer in whose custody by law the prisoner is at the time of the judgment given, for into his custody he is to be remanded after judgment pronounced, and there to stay till judgment executed.

Therefore, where judgment is given at the sessions of gaol-delivery, the execution is to be made by the sheriff, or his under-sheriff or deputy, for regularly he is in his custody ordinarily, but if the prisoner be in the *Tower of London*, (which is oftentimes the case of persons indicted for great treasons,) and he be arraigned before justices of *oyer and terminer*, he is commonly brought before them by a precept to the constable of the *Tower*, (which is an exempt prison from that of the sheriff,) and if he be convicted and attaint, he is commonly remitted thither, and the precept or warrant for execution must go to the lieutenant or constable of the *Tower*, for it is pursuant to the judgment, viz. *quod prædictus E. ducatur per præfatum locumtenent' turris London. usque ad dictum turrim, & deinde per medium civitatis Lond. directè trahatur usque furcas de Diburn* &c. And thus it was done in the cases of the traitors at the powder-treason 3 Jac. But usually a command or precept is made to the sheriffs of *London* and *Middlesex* to be assisting to the lieutenant.

If the prisoner be arraigned in the king's bench either for treason or felony, he is or ought to be always first committed [411]

(*) Vide Part I. p. 501.

to the marshal, and by him is to be brought to the bar upon his trial and judgment, and to him he is to be remitted after judgment till execution, and wheresoever the felony or treason was committed, yet the marshal is to make execution, for he is in this case the immediate officer to the court, and the prisoner is not in the custody of any sheriff, but of the marshal.

And therefore the entry in this case of felony is, *Et dictum est marescallo, Quod faciat executionem periculo incumbente.*

But in case of high treason the marshal is mentioned in the very judgment, viz. *quod ducatur per præfatum marescallum usque prisonam marescalli marescalliæ domini regis, & deinde usque ad furcas sancti Thomas Watrings trahatur & ibidem suspendatur &c.* thus is the entry of the judgment, *P. 44 Eliz.* against *Patrick Dalph B. R. T. 43 Eliz. B. R.* against *John Tipping, T. 39 Eliz. B. R.* against *John Jones.*

And in the case of *Brown P. 25 Car. 2.* that had judgment in the king's bench for felony upon the statute of 3 *H. 7.* for an offense committed in *Middlesex*, and there presented and convicted, the execution was made by the marshal in the usual place of execution in the county of *Surrey (b).*

Only in these and the like cases the court gives order to the sheriff of the county, where the execution is made, to be assisting to the marshal.

V. As to the manner of the execution, as it is to be done by the proper officer; so it is to be done pursuant to the judgment.

The judgment in case of felony is, *suspendatur per collum, quousque fuerit mortuus.*

The sheriff may not alter the execution, if he doth, it is felony, and some say murder. *Co. P. C. p. 211, 217. (c).*

[412] If the party be hanged and cut down and revive again, yet he must be hanged again, for the judgment is to be hanged by the neck till he be dead *(d).*

The judgment in high treason is complicated, viz. hanging, beheading imbowelling, &c.

The king may pardon all but the beheading, for this is part of the judgment, the judgment is not altered, but part of it remitted. *Co. P. C. p. 52.*

But this must be under the great seal. *Co. P. C. p. 31,*

2 Hawk. P. C. ch. 51. 4. Black. Com. ch. 32.

(b) The like was done in *Althoe's* case *T. 9 Geo. I. B. R. vide supra in notis Part I. p. 464.*

(c) *Vide Part I. cap. 42. p. 501. in notis.*

(d) *V. de Choron. 335.*

C H A P. LVIII.

Concerning reprieves before or after judgment.

REPRIEVES, or stays of judgment or execution are of three kinds, *viz.*

I. *Ex mandato regis*, thus we find it done in 3 H. 7. 7. a. tho ore *tenus*, or by some message, or by sending his ring, but at this day it is ordinarily signified by the privy signet, or by the master of requests.

II. *Ex arbitrio judicis*. Sometimes the judge reprieves before judgment, as where he is not satisfied with the verdict, or the evidence is uncertain, or the indictment insufficient, or doubtful whether within clergy; and sometimes after judgment, if it be a small felony, tho out of clergy, or in order to a pardon or transportation. *Crompt. Just. 22. b.* and these arbitrary reprieves may be granted or taken off by the justices of gaol-delivery, altho their sessions be adjourned or finished, and this by reason of common usage. *Dy. 205. a.*

III. *Ex necessitate legis*, which is in case of pregnancy (e), [413] where a woman is convict of felony or treason. *Co. P. C. 17. Stamf. P. C. Lib. III. cap. ult.*

1. *Enseinture* is no ground to stay judgment, and therefore if a woman convict be asked what she can say why judgment should not be given, *enseinture* is no cause of stay; but when judgment is given, she ought again to be demanded why execution should not be made, and there she may allege *enseinture in retardationem executionis*. 22 *Affiz. 17. Coron. 180.*

2. *Enseinture* is no cause to stay execution, unless she be *enseint* with a *quick* child, or which is all of one intendment, if she be *quick* with child. 22 *Affiz. 71. Coron. 180.*

3. When this is objected in delay of execution, it ought to be inquired of by a jury of twelve discreet women, and their verdict is to be recorded, and according as they give it the execution is to proceed or stay. *Ibid.*

4. This privilege is to be allowd but once, for if she be a second time with child, she shall not thereby delay execution, but the gaoler

(e) Thus it was by the civil law. *Dig. Lib. XLVIII. tit. 19. de pœnis l. 3.* and also by the laws of William the conqueror

l. 35. vide Braet. de Coron. cap. 32. §. 11. Fleta Lib. I. cap. 38. §. 15. vide Part I. p. 368.

shall be punished for not looking better to her. 12 *Affiz.* 11. *Coron.* 168. 23 *Affiz.* 2. *Coron.* 188.

If she be *priviment enseint* and not *quick with child*, and only so found by the jury of women, that is no cause of respite; but I have rarely found but the compassion of their sex is gentle to them in their verdict, if there be any colour to support a sparing verdict.

6. This reprieve is or ought to be a matter of record, and therefore I have always taken it, that altho she be delivered before the next sessions, yet the sheriff ought not to make execution after her delivery, neither ought the judge to give such direction upon the reprieve granted, but at the next session the woman must again be call-

[414] ed to shew what she can say why execution should not now be made, and she is to be heard 12 *Affiz.* 11. *Coron.* 168. *amefne al barre*, for it may be the *tempus præstitutum* for her delivery since the last sessions is not yet past, and she must stay till then, or it may be she hath since had the king's pardon, which the sheriff cannot allow nor judge of.

And therefore the books tell us, that after her delivery she was brought to the bar again to shew what she could say why execution should not be made; this bringing to the bar must needs be at a second or following sessions. 12 *Affiz.* 11. *Coron.* 168. 22 *E.* 3. *Coron.* 253.

The End of the Second Volume.

A

T A B L E

O F

THE PRINCIPAL MATTERS

CONTAINED IN THE

TWO PARTS OF THIS TREATISE.

N. B. In the following Table, where there are no numerical letters, the pages referred to are in the first Part, and so are the pages which precede these letters, *ii*; but the pages, the numbers of which come after these letters in the Table, are in the second Part.

In the first *Part* (through mistake) after page 146 follows a repetition of the pages 143*, 144*, 145*, 146*, which are distinguished by asterisks both in the book at large, and in the Table; so in the second *Part* after page 156 ensues an iteration of page 149*, and of the successive numbers to 157 exclusive, which iteration or repetition is also pointed out by asterisks, as well in the Table, as in the book.

Abatement.

A PPEALS, for what causes abated. *ii. Page 149, 150*
 Prisoner misnamed, or having a false addition pleads to indictment, or answers to it on his arraignment, is estopped from taking advantage of *misnomer* or falsity of addition. *ii. 175, 176*
Misnomer in civil action, not error. *ii. 175*
 Where prisoner will take advantage of *misnomer*, how special entry to be. *ii. 175, 237*
 Misnaming surname in appeal, cause of abatement; *contra* of indictment, *tamen quære.* *ii. 175, 176*
Misnomer of christian name in appeal or other action at suit of party, good plea *ii. 237, 238*

Whether *misnomer* of christian name in indictment be a good plea. *ii. Page 176, 238*
 Safest to allow plea of *misnomer* both as to christian and surname, and if grand-jury not discharged, indictment may be amended by them, and returned according to true name set forth in plea. *ii. 176, 237, 238*
 Exposition on 1 *H. 5.* of additions. *ii. 176, 177*
 If party indicted have no addition or a false one, he may except to former, and plead to latter. *ii. 176*
 Outlawry on such indictment, erroneous. *ib.*
 What good additions of degrees or mysteries, or not. *ii. 17, 177*

Addition

A TABLE OF THE PRINCIPAL MATTERS

Addition to be to substantive name,
not only to *alias dict.* ii. Page 177

It refers to last antecedent. ib.

Spinster applicable to man or wo-
man, but yeoman not. ib.

Single woman a good addition. ib.

Indictment against peer good with-
out addition. ib.

Several indicted for one offence,
misnomer, &c. of one quasheth
indictment only against him, and
rest put to answer, and so in
trespass. ib.

If in appeal or indictment *misnomer*
of surname is pleaded; replica-
tion, *que conus per une nosme &*
lautre, good; but in appeal or
action, if *misnomer* pleaded of
christian name, plaintiff must
take issue, and cannot reply in
that manner. ii. 238

In all cases of *misnomer* prisoner to
plead over to felony. ib.

Plea of *misnomer* or false addition
tried by same inquest, that passes
on prisoner, and not in foreign
county. ii. 238

Of pleas in abatement by matter
of record ii. 239

One indicted of same murder on
two indictments, is arraigned on
indictment last taken; second
shall not abate, but usually for-
mer quashed by judgment. ib.

How peer indicted by a common
name may plead *misnomer*; title
part of his name; but on plea
pleaded must shew forth writ
testifying it; plea triable by re-
cord. ii. 240

Abettors. Vide **Murder**, **Prin-**
cipal and Accessary, **Statutes**
in general, **Treason**, &c.

Abjuration.

Taken away. 605. ii. 68

Vide **Religion**.

Accessary. Vide **Principal and**
Accessary.

Acquittal. Vide **Judgment**,
Pleas, **Verdict**.

Addition. Vide **Abatement**.

Adjournment. Vide **Commis-**
sion, **Court**.

Admiralty.

What shall be said sea or salt
water. Page 424

Admiral at common law had con-
usance of capital crimes com-
mitted on the sea. 500

In capitals he had three sorts of
jurisdictions. ii. 12

Of the primitive jurisdiction of the
admiralty. ib.

They proceed by maritime laws;
trial by proofs. ib.

A capital sentence wrought no cor-
ruption of blood. ib.

Might hold their session any where
on land. ii. 12, 16

In creeks, &c. *infra corpus com.*
they had jurisdiction at common
law. ii. 15

General commissions of *oyer and*
terminer infra com. extended not
to misdemeanors on sea-coasts,
save in creeks, &c. *infra corpus*
com. ii. 16, 17

Exposition on 15 R. 2. giving ad-
miral jurisdiction in any river
or creek within body of county.
ii. ib.

It extends only to death of a man
and maihem. ib.

B. R. and general commissioners of
oyer and terminer have a concur-
rent jurisdiction. ii. ib. 18

Coroner of county, as well as of
admiralty may inquire of such
deaths happening in great rivers,
viz. arms of the sea flowing and
reflowing beneath first bridges.
ib.

What rivers this *act* extends to.
ii. 16

Extends to deaths happening in
great ships, not small vessels. ib.

This jurisdiction being annexed to
the admiralty, they may proceed
by marine law, tho before 28
H. 8. they proceed by commis-
sion

CONTAINED IN THE TWO PARTS.

fion under great seal, and by in-
 quifition ii. Page 16
 Exposition on 28 H. 8. of proceed-
 in treasons and felonies done on
 the sea. ii. 16, 17
 One stricken on sea dies on shore
 after the reflux, admiral by this
a^t hath no jurisdiction. ii. 17, 20
 Of the commission directed by this
 act. ii. 17
 Proceedings thereon by the course
 of the common law. ib.
 Accessary difpunifhable by this *a^t*,
 but how otherwise punifhable.
 ii. 17, 18
 In all crimes within it, clergy al-
 lowed, fave in treason, piracy,
 and murder. ii. 17
 A mute fhall have *peine fort &*
dure. ib.
 Whether attainder thereon works
 corruption of blood, and how in-
 dictment to be for that purpose.
 355. ii. 18
 If formerly a moral ftroke had
 been given on the fea, and party
 had died within body of county,
 neither admiral nor common law
 had jurisdiction. 426. ii. 19
 to 21, 162
 A robbery at fea, goods brought
 to land *infra corpus com.* not tri-
 able at common law. ii. 18
 Treason or felony at fea, not tri-
 able at common law, but on this
a^t. ib.
 To commiffions on this *a^t* is ge-
 nerally added a commiffion of
 peace, *oyer* and *terminer*, and
gaol-delivery. ii. 18, 19, 20
 Therefore Seflion ought to be *infra*
com. ii. 19

Vide Piracy.

Affray.

Second blow makes the affray. 456
 Vide Arrests.

Aiding and Affifting. Vide In-
 dictment. Murder, Principal
 and Accessary, Statutes in
 general, &c.

Alien.

Where aliens guilty of treason,
 where not. Page 59, 60, 92 to 96
 How merchant alien enemy fhall be
 ufed. 60, 93, 94
 If aliens renounce *king's* protec-
 tion, not to be dealt with as sub-
 jects. 60, 93, 94
 Sometimes alien enemies conftained
 to give fecurity, *quod fe bene ge-*
rant erga regem, &c. at other
 times to fwear fealty to the *king.*
 60, 93
 Their Debts and goods confifcate.
 95
 What a good plea in bar to debt
 brought by alien enemy *prima*
facie; what a good replication
 to avoid it. ib.
 How *king* may authorize alien
 enemies to fue for their debts
here. ib.
 A fubject of an hostile prince is
 prefumed to adhere to him; he
 fhall be ransomed, and his goods
here confifcate. 164, 165
 Where ftatute fpeaking of fubjects
 extends to aliens *here.* 541, 542
 How alien indicted and tried.
 Vide Challenge, Jury and Trial.
 Vide Alligeanee, Ambaffadors,
 Treason.

Alligeanee.

Divided and fubdivided. 62
 Oaths of alligeanee by common law
 and ftatute. ib.
 Antient oath how comprehensive;
 where and by whom to be taken.
 63, 64, 65
 Alligeanee, or *fidelitas regia*, due
 only to a fovereign. 64, 65
 Double kind of lige fealty, as
 where one prince is fubordinate
 to another, and yet hath *fumma*
imperia over his fubjects. 65
 Exemplified from hiftory. 65 to
 68, 72, 73
 Instance of *rex pater & rex filius*,
 (fupreme alligeanee being re-
 ferved to the father,) and of a
king fubordinate to both. 65,
 66, 67
 Oaths

A TABLE OF THE PRINCIPAL MATTERS

Oath applicable to *king's* person, as well as crown. *Page* 67

Salva fide & ligeantia domini regis, in all oaths of fealty, as well as profession of homage to a subordinate lord; omission punishable. 67, 68

Ought not to be two co-ordinate, absolute alligeances to several independent princes. 68

Divers before loss of *Normandy*, *ad fidem regis Angliæ & Franciæ*; how they ordered their homages and fealties. 68, 69

Difficulties thence arising. *ib.*

Homage, its division, and in what *homagium ligeum* differs from alligeance, and by whom to be performed, and when. 71, 72

Wherein that agrees with and differs from *homagium feudale*. 72

Of mixt homages, partly lige, partly not. 72, 73

Instance of mixt homage, when a sovereign prince hath a vassalage or possession in another prince's dominions. 73, 74, 75

Ambassador.

If a subject born, tho he never took oath of alligeance, become a sworn subject to a foreign prince, and is sent hither as his minister, and conspire against *king's* life, treason. 96

Whether a foreigner being agent of a foreign prince, either in amity or enmity, come over with or without *king's* safe conduct, and here conspire against *king's* life, or to raise rebellion or war, ought to be treated as traitor or enemy. 96

Whether punishable as an enemy for inconsummate attempts. 97
98, 99

The prince to whom sent the proper judge. 98

For rape, &c. indictable in ordinary course. 99

Whether *comites legati* have same privilege as ambassador. 100

Amendment.

Clerk of assise forgets to enter adjournment of commission of *gaol-delivery*; record not amendable. *Page* 494

8 *H. 6.* gives liberal power to justices to amend records. 649

Where caption of indictment returned is faulty in form, it is same term amendable by clerk of assise or peace, but not in another term. *ii.* 168

In another term clerk, that returns it, shall be fined for his informal return. *ib.*

Amercements.

A man drowned in a pit, coroner may charge vill to stop it, and if not done before next *gaol-delivery*, vill amerced. 424

Vill amerced for burying body before coroner sent for. *ib.*

One slain in the day in a town walled or not, town amerced; if insufficient, hundred; and in default, county; so upon an escape. 448, 603. *ii.* 73

So if out of any vill, hundred, and in their default, county amerced. 448. *ii.* 73

Murdrum, what sort of amercement; how far taken away by stat. 425, 447, 448.

Not imposed in cases of death *per infortunium*. *ii.* 73

Latrocinium, what, 425

A man killed either in day or night, and offender committed to constable or vill, upon escape vill, where party slain, or offender taken, fineable. 448

Felon in bringing to *gaol* escapes, is killed in pursuit, yet town amerced. 489, 490, 602

A man slain within precinct of the vill before day-light gone, offender escapes, vill amerced; otherwise, if slain in the night, except town be walled, and then in either case it shall be amerced;

CONTAINED IN THE TWO PARTS:

- ced; because gates ought to be shut from sun-set till sun-rising. *Page 448, 604.* ii. 73
- Amercements on country for escapes of felons, by whom to be set. 600, 603
- Vill amerced, if felon escape from private person without default. 601
- If felon in carrying to execution escape, vill not amerced. 602
- If vill commit a felon to four men to convey to gaol, who suffer an escape, vill amerced. 605
- If a stranger prevents arrest, where-by felon escapes, vill amerced. 606
- Negligent escape presentable in a *leet*, but they cannot set a common fine or amercement there. 603
- Amercement called *escapium* takes place in cases of death *per infortunium*. ii. 73
- Felon taken by township, and delivered to sheriff, &c. escapes, township not chargeable, but sheriff, &c. ib.
- But if in guard of constable, who is bringing him to gaol, he escapes; tho gaoler refused to take him, vill chargeable; nay, tho he be slain, because he resisted. ib.
- Vill amerceable only in case of death of a man; but in other felonies, as theft, tho thief not taken, no amercement or other penalty at common law, but by stat. of *Winton*. ii. 73, 74
- But if they had a felon in their custody, or in custody of a constable, and he escapes, vill had been amerceable, and so of the hundred. ii. 74
- In case of manslaughter, where the *decenna* was antiently amerceable, where vill. ib.
- If any of the family of clergymen, noblemen, or knights antiently committed a murder, &c. and fled, his master was amerceable. ib.
- How one present that takes not offender, is punishable. ii. *Page 75, 76*
- Where three amercements for one escape. ii. 75
- Township amerced for escape, tho felon never actually taken. ii. 93
- Apostacy.** Vide *Religion*.
- Appeals.**
- In treason long disused; appeals of treason in parliament wholly taken away by stat. 349. ii. 150
- Year and day for bringing appeal of murder, how computed. 427
- Whether jury may find guilty of manslaughter one appealed of murder. 449, 450
- In appeals, justices of *nisi prius* may inquire of abettors, and give judgement, and if plaintiff nonsuit, arraign prisoner at *king's* suit. ii. 41, *149
- May allow clergy to a convict of manslaughter on appeal. ii. 41, *149
- If appellant die or release, tho appellee be indicted also, yet on nonsuit of plaintiff, proceeding for *king* shall not be on indictment, but appeal. ii. *149
- What causes of abatement of appeal. ii. 149, 150
- Where party stricken in one county dies in another, appeal in either. ii. 163
- In appeal of death by writ, person killed is certain, but an appeal of robbery writ general, and it appears not what goods are till declaration. ii. 221
- Auterfoits* convict and clergy had a good bar to indictment or appeal for same crime. ii. 251
- And so, if clergy prayed, and court will advise upon it, tho clergy not actually allowed. ib.
- For pleas to appeal.* Vide *Plea*.
- If appellee stand mute, judgment of *peine fort & dure* shall be given. ii. 317
- Vide *Deute*.

A TABLE OF THE PRINCIPAL MATTERS

For restitution in appeals of robbery.

Vide Restitution.

For appeal of rape. Vide Rape.

For power of coroners in taking appeals. Vide Coroners.

For process in appeal. Vide Process.

Where clergy ousted in appeal, or not. Vide Clergy.

For appeal by approver. Vide Approver.

For arraignment on appeal. Vide Arraignment.

Approver.

Coroner has power to take his accusation. ii. Page 67, 227

Approvement described. ii. 67

In discretion of court to admit him to approve or not. ii. 226

Admitting approver long disused. ib.

Of what offenses approvement may be. ii. 227

In what suits. ii. 228

When one shall become approver. ii. 228, 229

Before whom he may become such. ii. 229

Of the manner of approvement and allowance of it. ib.

What duty of court on party's confessing felony and praying a coroner. ii. 229, 230

What process on appeal by approver. ii. 230, 231

Of proceedings on appeal after appearance of appellee. ii. 232, 233

Arraignment.

Definition and various etymologies of the word. 344. ii. 216 to 219

A rescuer of a traitor, or one suffering a wilful escape, or receiver of a traitor, shall not be arraigned till principal convicted. 237, 238, 51, 598. ii. 224

None to be attaint of treason without arraignment, except outlawed, &c. 344, 347 to 350

If indictment of murder charge one as principal in first degree, another as present and assisting, if principal in first degree neither appear nor be outlawed, principal in second degree arraigned. Page 437. ii. 223

Felons arraigned on the *mainour* at king's suit. 156, 348

But such arraignment wholly ousted by statutes. ii. 149*

Appeal brought at party's suit, and plaintiff nonsuit on that appeal, offender arraigned at king's suit thereon, and so if appellant die or release, and tho he be indicted as well as appealed, yet on nonsuit of plaintiff, proceeding for the king shall be on appeal only. ii. 149*, 221

But it must be where plaintiff hath declared on appeal by writ, or hath formed his appeal by bill. ii. 149*

Where defendant shall be arraigned on appeal, where not. ii. 149*, 150*, 221

Where appeal bad, defendant may be arraigned on indictment, if any, before the court. ii. 150*

If none, court may bind him over to another sessions, and in meantime to be of good behaviour. ib.

In civil action *de uxore raptâ cum bonis viri*, if defendant was convicted, it antiently served for indictment. ib.

So in special verdict in trespass for taking goods in *B. R.* if it was found that defendant took them feloniously, antiently this served for indictment. ii. 150*, 151*

And so if on a justification in slander for calling a man thief, verdict be for defendant, and this be in *B. R.* and for felony in same county where court sits, or if before justices of assize, having also a commission of gaol-delivery, plaintiff shall be forthwith arraigned on this verdict. ii. 151*

But

CONTAINED IN THE TWO PARTS.

- But return of rescue of felon, or breach of prison, not sufficient to arraign party upon. *ib.*
- In treason or felony offender must appear in person. *ii.* 216
- Of what parts arraignment of a prisoner consists. *ii.* 218, 219
- If prisoner hath any matter to plead, either in abatement or bar, then he pleads without immediate answering to the felony; but in some cases *si trove ne soit*, then to the felony, *not guilty.* *ii.* 219
- Prisoner to be brought to bar without irons, unless danger of escape. *ib.*
- But usually brought to bar *in vinculis* for fear of escape; but stands at bar unbound, till judgment. *ib.*
- In murder antiently court forebore to arraign prisoner on indictment, till year and day past, whether pending appeal, or not. *ii.* 220, 249
- But now by statute justices shall try him on indictment of murder, &c. tho within year, and if acquitted, he shall not be discharged; but at discretion of justices continued in custody; or on bail, till year and day past. *ii.* 220, 249, 250
- Where an inquisition before coroner is returned, and there is also an indictment for same offence, on which best to arraign prisoner; and where there ought to be a *cesset processus* on coroner's inquest. *ii.* 221, 222
- In case of appeal and indictment for same offence, where there ought to be a *cesset processus* on indictment. *ii.* 221
- If indictment be of manslaughter, and coroner's inquest of murder, best to arraign of highest offence, and spare the other. *ii.* 222
- If both of murder, but one insufficient, then to arraign on good one. *ii.* 222, 239
- If both good, and returned into court same sessions, best to arraign prisoner on both, (so as they be put on same inquest to be tried), and to indorse acquittal or attainder on both presentments; jury to be directed to acquit him on both, if acquitted on one, and *e converso.* *ii.* 222, 239
- Felon may be arraigned of breach of prison before convict of first felony; *contra* of escape or rescue. *ii.* 224
- Yet if *A.* be acquitted of principal felony, he may plead that acquittal in bar to indictment for breach of prison. 611, 612. *ii.* 224
- Where one brought in on *exigent* shall be arraigned *de novo*, *ii.* 224, 225
- If any exception taken by way of abatement, counsel shall be assigned. *ii.* 236
- Prisoner should not formerly in any case have had a copy, but only *oyer* of indictment *ib.*
- If exceptions to indictment appear material, court can quash it, and direct new bill to be sent to grand jury, wherein the faults may be amended, and prisoner arraigned *de novo.* *ii.* 237
- One indicted on two indictments; one for murder, other on 1 *Jac.* of stabbing; he shall be arraigned on both. 468. *ii.* 239, 240
- If on special verdict finding a felony, court erroneously adjudge it none, and that judgment be reversed, whether party shall be executed or arraigned *de novo.* *ii.* 247
- Justices would rarely arraign prisoner on indictment, especially for murder, within year after *death*, in favour of appeal, unless appellant an infant, or evidence very pregnant. *ii.* 249
- A.* attainder of felony by outlawry; outlawry reversed, he shall be put to answer same felony. *ii.* 251
- One by coroner's inquest found to have killed a thief assaulting to rob,

A TABLE OF THE PRINCIPAL MATTERS.

rob, &c. shall not be arraigned on that indictment, but dismissed without any judgment. ii. 395
 Justices of *assise* cannot arraign at K.'s suit on nonsuit before them on appeal, but this done in B.R. on return of *postea*. ii. Page 404
How a madman should be treated on his arraignment. Vide *Idem*.
For arraignment of accessory. Vide *Principal and Accessary*.

Arrest.

Who pursues not a felon is fineable. 448, 449, 484, 593 ii. 75, 76
 On *cap. ad satisfaciendum*, doors cannot be broke open; but on an *habere facias possessionem*, they may. 458
 Officer entering by outward door open, may break open inward doors. ib.
 If warrant not strictly lawful, yet if matter within justice's jurisdiction, and warrant under his seal, officer not to dispute validity. 460
 Justices warrant where void, and officer subject to false imprisonment. 577
 Where matters being within justice's jurisdiction, officer excused. ib.
 Warrant not expressing certainty of crime, irregular, and officer cannot break open doors. 577, 584
 One taken on such, how to be discharged. 578
 If rescued or wilfully let go, such escape or rescue not felony. ib.
 Such warrant erroneous, not void; it excuseth in false imprisonment, real crime being felony, or crime within justices cognizance. ib.
 General warrant to take all suspected void; false imprisonment lies for one taken thereon; *contra* of rule in B.R. of same import. 580, 586, 587. ii. 105, 112
 Justices may issue warrant for treason, examine and commit. 580

Where justice of foreign county may issue his warrant against a felon, and commit. Page 580
 Warrant issued by justice of proper county to take a felon, he before arrest flies into foreign county, and is pursued and taken, he must be carried before justice of foreign county; but if taken in proper county, he escape into the foreign, he may be brought before justice of either. 581. ii. 94, 115

Constable hath same protection on pursuit and arrest in foreign county, as proper, whether he hath a warrant or not. ii. 94
 Warrant, to whom directed. 581. ii. 110.
 May be directed to a private man, but he not compellible to execute it. 581. ii. 110
 Officer refusing or neglecting may be indicted. 581
 Constable cannot substitute. ib.
 Constable not bound to execute warrant out of his district, yet *factum valet*. 582. ii. 110
 Before whom warrant returnable; difference, where returnable generally, and where before justice who made it; not in election of party to go before whom he pleases. 582. ii. 112
 On warrant for surety of peace, or good behaviour, or against one that hath dangerously wounded another, business declared, and prisoner demanded, doors may be broke open. 459, 582. ii. 94, 95, 117
 If officer hath once laid hands on prisoner, he may break open outward doors to take him. 459
 If warrant directed to five bailiffs two or three may execute it. ib.
 Sheriff or bailiff, on *cap. ut legatum*, *cap. pro fine*, or other process for king, may break open doors, if not opened on demand. 459
 Where officer must shew his warrant, or not. 458, 462, 583. ii. 92, 116
 A pri-

CONTAINED IN THE TWO PARTS.

A private man must shew his warrant, or signify contents. *Page*

459

What sufficient notice of a man's being a constable, &c. 460 to 464

Justice of peace may grant a warrant on probable suspicion, and doors may be broke open by him to whom directed. 579, 580, 583

For what end constable, or any other, during affray, may break open doors, unless one dangerously wounded or killed. 589. ii. 95

Of what offenses constable having received information, or any private man, without a warrant may arrest, and break open doors on refusal to open them, or deliver up party. 589

Where law makes a private man an officer, and he may arrest a felon, and in order thereto break open doors. 588. ii. 76, 77, 92, 202, 203

Where constable *ex officio* may break open doors to take felon. ii. 90, 92, 202, 203

Where constable on *hue and cry* may break open doors, or not. ii. 102, 103

What previous to breaking open doors. ii. 103

Difference between private man's and constable's arresting on suspicion. ii. 92

On *excommunicato capiendo* doors cannot be broke open. ii. 116

If justices issue a warrant to take a felon, who is in justice's house, officer after demand, &c. may break open the door; and so for suspicion of felony. ii. 116, 117

Where sheriff on civil process may break open the house of another than the party against whom process is. ii. 117

Judge of *B. R.* may *ore tenus* command a tipstaff to arrest, without expressing the cause ii. 586

Officer or private man breaking open a house to take a felon, a

trespasser to the owner, if felon not there. ii. 117

Justices of *oyer and terminer* may issue a commission to take one indicted before them, whereby doors may be broke open, but commission must be shewn if demanded. ii. *Page* 106

Constable, on his watch may break open doors to keep the peace, or in case of disorderly drinking, or noise in a house at unreasonable hours ii. 94, 95

Constable *ex officio* may arrest one, that has broke the peace in his view, and keep him in his house or stocks. 587

Where one is dangerously hurt, constable may imprison on common fame, or report of another. ib.

Whether on an affray out of view, he can arrest without warrant. ib.

Where private man may arrest without warrant, whether felony done in same county, or not. 587, 588. ii. 76

A. dangerously wounds *B.* *C.* being present may imprison *A.* till brought before justice, or delivered to constable. 558. ii. 77

Felony committed, a private man may arrest on probable cause of suspicion. 558, 595. ii. 78, 81

What are probable causes. 588. ii. 81

How and in what time private man to dismiss himself of offender. 589. ii. 77, 81

Most usual and safe to bring him before a justice, or if that cannot be done in time, to call constable to one's assistance. 590. ii. 76, 77

Whether private man can raise power to take or detain a felon. 601. ii. 76

Prevention of arrests, a misdemeanor, not felony. 606

Of persons that may arrest. ii. 72

What required to maintain a justification of imprisonment, on

A TABLE OF THE PRINCIPAL MATTERS

- suspicion, and how officers and private men are to justify in such cases. ii. Page 78, 79, 80, 91
- No felony, no ground of suspicion. ii. 78
- No felony done, party arrested may be enlarged, and escape punishable. ii. 78, 79
- But in case of a felony, tho party arrested innocent, who lets him go not being duly delivered, is punishable. ii. 79
- Regularly, party suspecting must arrest. ib.
- What party suspecting is to do to oblige constable to assist. ib.
- Justice to be acquainted by him with whole case. ib.
- Justification in aid of constable on felony done, and a suspicion, is good. ii. 79, 80
- Suspicion may be by any; imprisonment must be by constable. ii. 80
- If goods of *A.* be stolen, and found in *B.*'s custody, and *A.* makes the case appear to the constable, and requires him to bring *B.* before a justice, this is a good justification in *A.* *sans averment*, that he suspected him. ib.
- A felony committed, *A.* has probable cause to suspect *B.* and acquaints *C.* with the whole matter, *C.* hereupon having probable cause to suspect *B.* may justify by his own suspicion; and so may one coming in aid of *A.* to arrest *B.* ib.
- One may alledge twenty causes of suspicion, and it shall not make his plea double: what makes an issue upon the whole. ii. 81
- If private man discharge party suspected without bringing him to justice or constable, it is an escape, but makes not imprisonment illegal. ib.
- He must not carry him to gaol of any other county than where taken, unless there be no gaol in that county. ii. 81
- Arrest on suspicion permitted by law, not commanded. ii. 82, 84
- Not same privilege in all points allowed to him, that arrests on suspicion, as to one arresting on hue and cry, or by warrant, or his certain knowledge of the felony. ii. Page 78, 82, 84
- If he, that arrests on suspicion, break open doors, it is at his peril; if party be a felon, it is justifiable, otherwise not; but he may enter by the doors open to arrest. ii. 82
- To prevent murder a private person may break open doors. ib.
- But in all arrests must acquaint party with cause thereof. ib.
- Party not bound to take notice of a private man as authorised to arrest, and may fly from him if innocent. ii. 83
- But is bound to take notice, and submit to a constable arresting in *king's* name, or offering so to do. ib.
- Private man cannot beat innocent man arrested on suspicion, but only lay his hands gently on him. ib.
- A bailiff cannot beat defendant before the arrest, yet after arrest and escape, a bailiff may justify beating him. ib.
- Of officers of publick justice *virtute officii* impowered by law to arrest felons and persons suspected of felony, and who they are. ii. 85, 86, &c.
- How they are protected by law. ii. 85
- Their actings not arbitrary, but necessary duties; they under severe punishments for neglect. ib.
- Need no warrant to arrest felons, and those probably suspected. ib.
- All persons bound to be aiding and assisting to those officers upon their summons in preserving the peace, and apprehending malefactors, especially felons. ii. 86
- If any refuse, how punishable. 581 ii. 86, 115
- Assist-

CONTAINED IN THE TWO PARTS.

- Assistants under common protection of law with officers. ii. *Page 85*
- By statute may plead general issue, and have double costs, as well as officers. ib.
- Where a private man may arrest a felon, these officers may do it. ib.
- What power justices of peace have, *quoad* arrest of felons. ib.
- Justice seeing a felony, or other breach of peace done in his presence, may arrest felon. 587. ii. 86
- So he may by word command any one to take him, which is a good warrant without writing. ib.
- But if done in his absence, then must issue his warrant in writing. ib.
- If there be any riot or breach of peace like to happen by a tumultuous meeting, &c. he may command his servant or others, to prevent it by arresting parties. ii. 86, 87
- If he hath, either from himself or by a credible information, knowledge of a felony done, and just cause of suspicion of any one, he may himself arrest and commit that person. ii. 87
- By statute sheriff enjoined to arrest felons, and all persons required to assist on his summons. ib.
- Taking felons belongs to sheriff, as conservator of peace. ib.
- Sheriff may arrest one suspected of felony. ib.
- Coroner conservator of peace with regard to all felonies, and can command them to be apprehended, tho he can take no inquisition but of death. ii. 88
- Office of *constable*, ministerial and original, or primitive, as conservator of peace at common law. ii. 88, 90
- Ought to execute precepts of justices, coroners, &c. or in default, fineable. ib.
- By his original power may, for breach of peace and some misdemeanors less than felony, imprison. ii. *Page 88, 90*
- If one expose an infant in the cold to destroy it, or charge parish, constable may take him and put him in the stocks. ib.
- If assaulted, tho in his own case, may imprison party and carry him to gaol. ib.
- But for opprobrious words, or a general hindrance of him to summon trained bands to attend mayor of *London* on his precept, held he could not justify imprisoning, but ought to have brought party to a justice. ib.
- What may be done by constable, may be done by his deputy; for by law he may make a deputy, who within 7 *Jac.* may plead general issue. ib.
- If one menace to kill another, on complaint constable may arrest and put him into the stocks, till he can conveniently bring him to a justice, and to avoid present danger. ii. 88, 89
- Constable cannot take surety of peace by recognisance, but whether by bond, and that for affray or menace of breach of peace in his view. ii. 89, 90
- If he be informed, that a man and woman are incontinent together, he may take neighbours and arrest them, and commit them to find sureties for good behaviour. ib.
- Whether he may arrest one suspiciously resorting with women of ill fame to a house suspected of common bawdry, and what a good justification for him, or any in his assistance to plead. ib.
- May arrest suspicious night-walkers and men that ride armed in fairs or markets, or elsewhere. ib.
- May execute his office on information and request of others, that suspect and charge offenders but with suspicion. ib.

A TABLE OF THE PRINCIPAL MATTERS

- Where felony done, he may *ex officio* arrest and imprison, till felon can conveniently be conveyed to a justice or common gaol. ii. Page 89, 90
- All one, whether felony done in same vill, or in any other vill or county, if felon be within vill, where he is constable. ib.
- Is by law enjoined to take a felon, and, if he neglects his duty, indictable. ii. 91
- Not material, whether he saw felony committed, or hath it by complaint and information; in both cases bound to take felon, and search for him within limits of his jurisdiction, and to raise hue and cry. ib.
- If a felony done, *A.* suspects *B.* on probable grounds, and acquaints constable, and requires his aid, constable may apprehend *B.* tho suspicion arise in *A.* first. ib.
- But *A.* ought to be present. ib.
- He ought also to inquire and examine circumstances and causes of suspicion of *A.* which tho he cannot do on oath, yet such information may make it constable's suspicion. ii. 91, 92
- A felony in fact must be done, and constable must aver it in his plea, and it is issuable. ii. 92
- Constable, officer known within vill, presumed of sufficiency. ib.
- Constable to do his duty, as well in case of probable suspicion, as actual felony. ii. 93
- On a sudden affray he may put parties in stocks or prison, till their passion or intemperance be over. ib.
- If crime committed, for which constable may arrest, whither he may convey prisoner. ii. 95
- Safest to carry him before a justice. ib.
- Till he can conveniently convey parties arrested to a justice, or common gaol, he may detain them in stocks, if none in that vill, then in those of next. ii. Page 95, 119
- If he be of quality or sick, how long, and where constable may, and ought to keep him. ii. 96, 119, 120, 122
- Charges of sending malefactors to gaol by common law are to be born by vill, where apprehended; but by statute by prisoner, if able; if not, how levied. ii. 96
- Commission issuing out of *Chancery* to take *J. S.* and his goods, before indicted, against law. ii. 106
- Yet a good justification in officer. ib.
- Sheriff at common law might issue a warrant, to take a felon before indictment. ii. 107
- Coroners by their warrants may attach man-slayers after inquisition finding them guilty. ib.
- May also make out warrants against persons present, and not guilty; against burglars and robbers. ib.
- If warrant be barely for a misdemeanor, officer cannot pursue party into another county; but in case of felony, affray, or dangerous wounding, officer may pursue him, and raise hue and cry upon him into any county. ii. 115
- Justice's* warrant sufficient cause of suspicion and pursuit. ib.
- One having warrant to arrest for felony, &c. cannot make a warrant to another as his deputy, or command another to execute it in his absence. ib.
- Warrant directed to a known officer, enough for him to say, *I arrest, &c.* ii. 116
- Safe for officer to acquaint party with what he arresteth him for. ib.
- A warrant of a justice may be executed in a franchise. ib.
- If justice hath jurisdiction, tho he err in granting his warrant, officer

CONTAINED IN THE TWO PARTS.

ficer in executing it excusable. ii. Page 119
 Yet in some cases, as touching rates for the poor, tho he hath jurisdiction by 43 *Eliz.* officer is punishable for executing warrant, where none ought to issue, because a circumscribed jurisdiction. ii. 119
 After arrest officer forthwith to bring party to gaol, or to justice, according to warrant. ib
 When he hath brought him to justice, yet in law he is in custody, till either justice discharge or bail him, or till he be actually committed. ii. 120
 For more touching warrants. Vide *Justice of Peace.*
 Where killing peace-officer is murder or manslaughter. Vide *Murder and Manslaughter.*
 Where killing a felon, that resists or flies before or after arrest, is justifiable or not. Vide *Homicide.*
 Vide *Commitment, Hue and Cry, Justification, and Peace Officer.*

Arson.

Defined. ii. 566
 Felony at common law; irreplevisable by statute; antient judgment burning. ib
 By 8 *H. 6.* letters of menace were treason. 567
 Not said in indictment *domum mansionalem*, but *domum*. ib
 What shall be said *domus*. 567, 568
 Where felony, or not, to burn a barn or out-house. 567
 In *Northumberland* felony by statute to burn a stack of corn. 568
 Burning house of another. felony; but if tenant for years burn his own with intent to burn another's, and none but his own is burnt, only a misdemeanor; *contra*, if house of another burnt. 567, 568
 Setting fire to a house without burning any part, no felony; *contra*, if part burnt, felony by common law. 568, 569

Must be a wilful and malicious burning, else only trespass. Page 569
A. intending to burn *B.*'s house, burns *C.*'s; felony. ib
 Where burning a house, out-house or barn, shall be oust of clergy, or not. 567 to 575
 Accessories *before* ousted by 4 & 5 *P. & M.* 572 to 575
 Whether attainder by outlawry formerly ousted them of clergy. 573
 Whether men in orders convicted hereof shall have clergy. 574

Assault.

Where one enters on possession of another, where justifiable, where not. 485, 486

Vide *Homicide, Murder and Manslaughter.*

Assembly. Vide *Riot.*

Assent. Vide *Principal and Accessary.*

Assise. Vide *Justice of Assise.*

Association. Vide *Commission, Gaol-delivery, Oyer and Terminer.*

Attainder.

None to be attaint without being arraigned. ii. 344 to 350
 Clergy allowed to one attaint 521
 Whether outlawry is an attainder 521. ii. 350, 352

Vide *Forfeiture.*

Auterfoits acquit, attaint or convict. Vide *Judgment, Pleas, Verdict.*

Bail.

ONE bailed is *in custodia*; *contra* of one let to mainprize. 325, 620
 How

A TABLE OF THE PRINCIPAL MATTERS.

- How the several entries are, and of other differences between bail and mainprize.** ii. 35, 124, Page 125
- Admitting bail, where it ought not, a negligent escape, but not voluntary, except by design.** 596, 597
- Bail antiently taken in no sum certain, but *traditur in ballium* to J. S. which is the usual form in all civil actions** ii. 125
- Of bail *corpus pro corpore*; now rarely used; why disused; only fined, if he brought not in principal at the day** ib
- In civil actions this bail sometimes in use** ib
- Usually bail only a recognizance in a sum certain, for appearance of a felon; principal bound in double the sum. *Vide* the form** ib
- What sort and number of sureties are required, but these things, as well as the sum, discretionary in him who takes recognizance; therefore sureties may be examined upon oath.** ib.
- What the words *ad standum juri* import.** ii. 126
- Form of the true and regular bail, where party an infant, or in prison, and so absent; hereupon a warrant issues under hand and seal of the person who takes the bail, for his enlargement, called *liberate*.** ib
- Seal of justice not necessary; subscription sufficient.** ib
- If party bailed by justice before commitment, or if committed and brought into B. R. or sessions to be bailed, then himself is also bound** ib
- Sometimes recognizance simple, with a condition added for his appearance, and sometimes condition contained in body of recognizance.** ib
- When any is bailed for any misdemeanor by B. R. either on return of *habeas corpus*, or otherwise, the return or record ought to be first filed, and a *committitur marescallo* entered, and then bail taken.** Page ii. 126, 127
- All bailed in B. R. are *de facto*, or supposed in law to be *in custodia marescalli*.** ii. 127
- Such bail not only a recognizance in a sum certain, but also real bail, and they are his keepers, and, if cause, are punishable by fine beyond the sum mentioned, and may reseise prisoner, if they fear his escape, or render him in their own discharge.** ii. 126, 127
- Regularly, in all offenses against common law or statutes, that are below felony, offender bailable, except after judgment, or bail be ousted by statute** ii. 127
- What statutes relate to bailing offenders** ii. 127
- Who antiently were principally concerned in bailing them.** ii. 127, 128, 136
- Who bailable by common law, or not.** ii. 128, 129
- Exposition on 3 E. 1.** ii. 127 to 136
- B. R. may bail in any case whatsoever, either in treason or murder, but this discretionary, not *de jure*.** ii. 129, 148
- Whereon bail may be taken by B. R. viz. on original indictment, &c.** ii. 129
- One found guilty of homicide *se defendendo*, justices of gaol-delivery may certify it into chancery, that he may sue his pardon on course, and may bail him till next sessions.** ib.
- They on inquisition before coroner finding it *se defendendo* specially, may bail party till next sessions to procure such pardon.** ii. 130
- They may in the interval of the session bail a convict of manslaughter having a pardon to plead, to another sessions** ib.
- But if one be convict on trial against opinion of the judge, judge cannot bail him to sue his pardon.** ii. 130
- While court adviseth, whether convict within clergy, he is not bailable.** ii. 130, 131, 132
- One

CONTAINED IN THE TWO PARTS.

- One indicted of murder at a sessions of *gaol-delivery* prays his trial, but prosecutor for *king* is not ready: on cause shewn, justice of *gaol-delivery* may bail. ii. Page 131
- One arrested by *king's* personal command, notailable on writ *de homine replegiando*, yet by *B. R.* on chancery on an *habeas corpus*. ib
- Such a mandate under the great seal, void ib
- Common writs *de homine replegiando*, or *de manucaptione* directed to sheriff ii. 132
- Some crimes notailable for the heinousness, other for the notoriety of them ib
- Persons outlawed notailable by 3 *E. 1.* ib
- If an outlaw of felony be taken on a *capias utlegatum*, and plead in avoidance of outlawry, or bring error to avoid it, *B. R.* may bail, whether outlawry on appeal or indictment ii. 132, 133
- If one be indicted or appealed for aailable offense, indictment or appeal hinders not his bailment; *vide* where not allowed till he had pleaded to the indictment ii. 133
- If one be indicted before justices of a higher jurisdiction; as before justices of *oyer and terminer*, he cannot be bailed by justices of peace ib
- Persons having abjured for felony, notailable ib
- Taken in the *mainoeuvre* notailable, but that is intended of thief himself ib
- Felons breaking prison, notailable ib
- Nor notorious thieves; herein common fame may be opposed against their bailing, unless they shew reasonable evidence to prove their innocence ib
- Nor persons approved, except approver be dead, or hath waved his appeal, or person accused be of good fame ib
- Nor persons arrested for *arson* ii. Page 133, 134
- Nor for falsifying *king's* coin ii. 134
- Nor for counterfeiting *king's* great or privy seal ib
- Nor one excommunicate, unless for a temporal cause, and then on a prohibition granted, he may not only be bailed, but delivered, or on an appeal, and a special writ *de cautione admittenda*, which if not obeyed by the ordinary, a special writ may issue for his enlargement ii. 134
- Nor one imprisoned for some open misdeed; as if *A.* dangerously wound *B.* he may be imprisoned till it be known, whether party will die or live, and regularly, notailable till danger appear to be over ib
- Nor prisoner for treason, that toucheth the *king*, whether indicted or not ib
- But all these crimes areailable by *B. R.* ib
- Whoailable by sheriff by 3 *E. 1.* ii. 134, 135
- Persons indicted before him of larceny, if of good fame ii. 134
- Or imprisoned for a light suspicion ib
- Or indicted for petit larceny ib
- Or accused of receiving felons ib
- Or of commandment, force, or aid to felony done ib
- Regularly in all felonies, even murder, accessoryailable, till principal attain t ii. 135
- But principal once attain t, and then accessory taken, he shall not beailable till he hath pleaded to indictment, but after pleaded he shall ib
- One indicted for offense, wherefore he ought not to lose life or member,ailable, save for offenses against *acts* ousting bail ib
- One appealed by an approver since dead,ailable ib
- If tenor of *mittimus* be to detain one without bail or mainprise; yet

A TABLE OF THE PRINCIPAL MATTERS

- yet if offenseailable, he may be bailed ii. Page 135
- Penalties of 3 E. 1. for bailing one notailable, and for detaining persons replevisable, after surety offered ib.
- Justices of peace being instituted, bailing offender devolved on them ii. 136
- Their power of bailment extended farther than sheriff's, and in some kinds, than limits prescribed by 3 E. 1. ib.
- In some respects sheriff's power, as to bailing in crimes not capital, enlarged by 23 H. 6. ii. 136, 137
- By 34 E. 3. Justices of peace have power to take and commit malefactors, or bind them to good behaviour. ii. 136
- 1 R. 3. gives to any one justice power to bail any prisoner for felony, and excepts not manslaughter. ii. 137
- Before this act doubtful, whether they could bail till indictment at their sessions. ib.
- 3 H. 7. repeals 1 R. 3. as to bailing by one justice, and gives it to two justices, whereof one of the *quorum*; it limits their power of bailment to casesailable by law, and takes in 3 E. 1. as the *directory*, who areailable by law. ib.
- 1 & 2 P. & M. expressly makes 3 E. 1. a direction for bailing offenders. ii. 128, 132, 137
- By 1 & 2 P. & M. one arrested for manslaughter, or other felonyailable by law, or suspicion thereof, shall not be bailed but by two justices, one of *quorum*, both to be present at bailing such offender, and certify it at next *gaol-delivery*. ii. 138
- But justices of peace and coroner in London, &c. to do as formerly. ib.
- Justices of *gaol-delivery* may fine justices of peace offending against this act. ib.
- 2 & 3 P. & M. only provides for examinations, &c. to be taken by justices, as well on commitment, as bailing prisoner for manslaughter, or other felony. ii. 138
- The question, whether justices of peace may bail in manslaughter, considered. ii. 138, 139, 140
- In murder B. R. only can bail. ii. 139
- In manslaughter, if there be plain proof, or a confession, that one was killed, and that by J. S. whether done *ex malitiâ præcogitatâ*, or on a sudden falling out, or but *se defendendo*; yet one or two justices (whereof one of the *quorum*), cannot bail by any law in force. ib.
- Whether it doth *constare de personâ occidentis*, or *de modo occidendi*, or not, yet if party indicted of manslaughter, or tho it were but *se defendendo*, justices of peace cannot bail. ib.
- But if manslaughter committed, and a party suspect is brought before two justices of peace (whereof one of *quorum*), and there be any doubt of identity of the person, they may bail him by 1 R. 3. ib.
- 1 R. 3. the basis of 3 H. 7. and this of 1 & 2 P. & M. ib.
- 3 E. 1. (*Westm. 1.*) tho it say *de morte hominis*, there is no bail at common law, it must be intended, when offender is certainly known; for it generally provides, that persons taken on a light suspicion shall be bailed. ib.
- 1 & 2 P. & M. supposing one taken for manslaughterailable, must mean such a manslaughter, where party is only suspected, not where fact is done by him. ii. 139, 140
- Where writ *de homine replegiando* lies, or not. ii. 141
- Of the general writ *manucapiane*. ib.
- Where

CONTAINED IN THE TWO PARTS.

Where it lies. ii. Page 141, 142
Some taken by writ or process
may be bailed, *virtute officii*.
ii. 143

Where special writs of mainprise
lay ii. 143

Prisoners for felony antiently bailed
to serve *king* in his wars ib.

B. R. may, *virtute officii*, bail any
brought before them ii. 148

Sheriff might formerly, *ex officio*,
at common law bail offenders
indicted before him in his *Turn*,
or on a commission to him, but
this power transferred to justices
of peace ii. 148, 149

Marshall of *B. R.* took on him an-
tiently, *virtute officii*, to bail
persons indicted or appealed,
but this power wholly ousted by
statute ii. 149

At common law, without aid of
18 *Eliz.* prisoner acquitted
might be bound to his good be-
haviour, if of ill fame ii. 394

In indictment or appeal transmit-
ted to justice of *nisi prius*, if
prisoner be bailed to appear in
B. R. and appear not, prisoner
to be called on his bail, and de-
fault recorded; and so on re-
turn of *postea*, new process a-
gainst prisoner and his bail ii.
404

Personating bail, felony *sans cler-*
gy by 1 *Jac.* but no corruption
of blood, or loss of dower 696

Bail taken, but not filed, not with-
in it, [but since made felony].
ib.

Vide *Habeas Corpus*.

Bailiff. Vide Arrest, Homicide,
Murder.

Bailment. Vide Larciny.

Barretry.

Whether in indictment will need
be alledged. ii. 180

Triable *de corpore comitatûs* ib.

A barretor is so every where ib.

Bastard-child. Vide Evidence,
Indictment.

Behaviour.

At common law, without aid of
18 *Eliz.* prisoner acquitted
might be bound to his good be-
haviour, if of ill fame. ii.
Page 394

Bigamy. Vide Polygamy.

Bona & catalla. Vide Indict-
ment, Restitution.

Breach of Peace. Vide Arrest,
Riot, Justice of Peace.

Breach of Prison.

Thereby causing escape of traitors,
treason; but to make it so, they
must be actual traitors; so of
felons, felony. 141, 234 to
237, 326

Prisoner for treason, &c. break-
ing prison may be indicted be-
fore convict of principal offense;
contra of escape or rescue 237,
238, 269, 611. ii. 224, 254

Breach of prison by traitor only
felony ii. 237

War levied to break prison, with
intent to deliver some particular
persons, unless imprisoned for
treason, only a great riot; but
if to break prisons generally,
treason 134

Conspiracy to enlarge a traitor, a
misdemeanor only 326

Rescuing prisoners for a new trea-
son, tho not expressly mentioned
in the *act*, is by necessary con-
struction treason 236

If commitment not in writing un-
der seal, breach of prison, save
by a court of record, no felony
583, 584

Breach of prison by prisoner for a
misdemeanor, felony by common
law 607

Exposition on statute *de frangenti-*
bus prisonam 608 to 612

What

A TABLE OF THE PRINCIPAL MATTERS

- What a prison within this act. *Page* 608, 609
- What being in prison for such a cause as requires *judicium vitæ vel membrorum* 609 to 611
- Capital offenses only intended by these words 609
- A prisoner for petit larciny or homicide *se defendendo*, &c. breaks prison, no felony *ib.*
- But if commitment expresses larciny above value, or manslaughter, tho *de facto* otherwise, felony. *ib.*
- If *mittimus* want a regular conclusion, sufficient; but *sans* cause expressed, whether felony *ib.*
- When breach of prison first became felony 610
- Enough, if prisoner hath a notification of offense whereof arrested, to make breach of prison felony *ib.*
- If offense, for which party committed appear not by matter of record, as indictment, necessary a felony be done, and so laid in indictment, and proved; else breach of prison no felony; *contra*, if it appear by record. 599, 610
- Breach of prison within clergy, tho principal felony not 612
- Breach of prison by one committed for suspicion of felony, if a felony done, is felony 610
- One committed for a felony made by statute *Puisne* to 1 E. 2. breaks prison, felony 611
- Prison fired without privity of prisoner, he may break it to preserve himself *ib.*
- If gaoler set open prison doors, and a felon escape, no felony in prisoner *ib.*
- If prisoner rescued, or prison broke by strangers without his privity, no felony in prisoner, but in strangers as a rescue; but if by his procurement, felony in him, as a breach of prison *ib.*
- If felon acquitted of principal felony, he shall not be arraigned of breach of prison, or if indicted for the latter before acquitted of the former, and then be acquitted of the former, he may plead it in bar to indictment for the latter. *Page* 611, 612. *ii.* 224, 254, 255
- Breach of prison carries a presumption of guilt, and is a felony super-added to the former. *ii.* 133
- Vide *Escape, Evidence, Indictment, Rescue.*
- Bribery.**
- Thorp*, C. J. adjudged to death for it 262, 263
- Buggery.**
- Buggery with a man or beast, principal ousted of clergy by 25 H. 8. revived by 5 Eliz. accessories *before* and *after* within it. 669
- Debet esse penetratio* 628, 629
- Emissio*, evidence of penetration 628
- Minima penetratio* makes the crime *absque emissione* *ib.*
- Woman may be guilty with a beast within this act 669
- If committed on one of age of discretion, both felons; otherwise only the agent 670
- All present and assisting, principals *ib.*
- Burglary.**
- Watching at lane's end a presence, and makes party a principal 439, 534, 555, 563
- Hamfecken* explained 547
- In a vulgar acceptation how burglary understood 548
- Division and description of legal burglary 549. *ii.* 360, 361
- It must be in the night 549, 550
- How indictment must be *ib.*
- When it shall be said night 550, 551
- Both

CONTAINED IN THE TWO PARTS.

- Both breaking and entering must be in the night, and a felony done or intended *Page* 551, 555, 559
- But if hole broke one night, with intent to enter another, and they come the next night, and commit felony thro the hole, burglary 551
- Antiently barely coming with intent to commit it, capital *ib.*
- Distinction between breaking in law and fact 551, 552
- A bare breaking in law not sufficient to make a burglary *ib.*
- What an actual breaking 552
- Burglary by fraudulent pretences, and where it may be without actual breaking 552, 553
- Whether going down a chimney to steal, be burglary 552
- Servant in the night opens a door and lets in a thief to rob his master, burglary in both 553
- A.* enters by an open door, &c. and then unlatcheth a chamber-door to steal, burglary *ib.*
- If a thief be lodged in an inn, and in the night steal goods, and go away; or if he enter secretly in the day, and stay till night, and then steal and go away, not burglary; *contra*, if he open an inner chamber-door and steal. *ib.*
- Servant in the night draws the latch of a stair-foot-door, and enter's his master's chamber to murder him, burglary 554
- Whether opening door to go out be burglary *ib.*
- Whether, if door of the chamber of a lodger in an inn be latched, and a lodger in the night open his own door and steal goods in the house, be burglary *ib.*
- But if he open chamber of another lodger to steal his goods, burglary *ib.*
- It must in that case be supposed of the mansion-house of the inn-keeper 554, 557
- Entring *per ostia aperta*, breaking a chest and stealing, not burglary, because chest not part of house; *contra* of a study, counting-house or shop, tho not usually lodged in the study, &c. *quare* of a cupboard or counter fixed to the house *Page* 554, 555
- A.* with intent to rob *B.* breaks a hole in his house, *B.* for fear throws out his money, *A.* takes it and carries it away, whether burglary 555
- Where putting hand, hook or pistol within window, burglary 553, 555
- But whether shooting without, and bullet coming in be an entry, to make it burglary 555
- A.* sends infant of seven years in at window, who steals and delivers goods to *A.* burglary in *A.* tho child who made the entry, be excused 555, 556
- So in husband, where wife in his presence, and by his coercion commits burglary, tho she shall be acquitted 556
- How indictment ought to be for breaking and entring a church. *ib.*
- May be committed of a house, tho all persons out *ib.*
- So, if one have two houses, and live in them alternately *ib.*
- A chamber in a college or inn of court, a mansion-house 522, 527, 528, 556
- Must be laid *domum mansionalem*, and not *domum* 550
- How indictment laid for breaking lodgings of a servant of the king at *Whitehall* 522, 523
- Whether it can be committed of a lodger's chamber in house of another, and whose mansion-house it shall be supposed 556
- If servant's lodging be broke open, whose mansion-house it shall be supposed 557
- A tent or booth not a mansion-house, therefore provided for by statute *ib.*
- A shop is parcel of a mansion-house *ib.*
- A. de.*

A TABLE OF THE PRINCIPAL MATTERS

- A.* demises to *B.* a shop parcel of his house, burglary may be committed of it, if lessee or servants ever lodge *there*; *contra*, if they only work *there*. Page 557, 558
- Where out-buildings, as barns, &c. are parcel of mansion-house, and burglary may be committed of them, or not. 558, 559, 567
- Burglary, how antiently defined. 559
- Whether breaking wall about house or gate thereof, and entering *per ostia aperta*, be burglary *ib.*
- Clearly not, if thief come over wall of the court *ib.*
- Must be proved to be *ad intentione* to commit some felony, not *ad verberandum*, tho killing may be the consequence 561
- Tho intent not accomplished, yet burglary, and so differs from robbery 561, 562
- Intention must be of a felony by common law, and not *newly* made by *statute* 562
- Breaking house with intent to commit a rape, tho *per ascuns* no burglary, yet otherwise *ib.*
- In burglary those without assisting, ousted of clergy *ii.* 359
- Simple burglary, 1. When any one in the house, and put in fear. 2. Where none put in fear, or none in the house. *ii.* 360
- Principals ousted of clergy in former by 1 *E.* 6. and in latter by 18 *Eliz.* 549, 555, 562, *ii.* 360, 361
- Accessory *before* not ousted [till late act]. *ii.* 361, 363
- 4 & 5 *P.* & *M.* extends not to burglary at large 564
- Of special or improper burglaries, or larciny from, or robbing of houses,**
- Robbing one in his dwelling-house, the owner, &c. therein, and put in fear.
- In what cases, (*as verdicts, confession, standing mute, challenge ultra twenty, and not directly answering*) clergy taken away. Page 518, 548, 562. *ii.* 351
- Accessaries *before* in all cases aforesaid ousted on indictment, in what cases only in appeal 521, 562, 563. *ii.* 362
- 23 & 25 *H.* 8. & 4 & 5 *P.* & *M.* require stealing as well as breaking 563. *ii.* 352, 361
- Exposition on 25 *H.* 8. as to ousting clergy in a foreign county, revived by 5 & 6 *E.* 6. and now in force 518, 519, 536. *ii.* 341, 348, 351, 352
- In 23 *H.* 8. a saving for clerks, but by 1 *E.* 6. equally exempt with others 517 to 521
- Clergy allowed to one attainat 521 *ii.* 352
- If a stranger only be in the house, clergy allowed *ii.* 352, 353
- Breaking a house by day or night with intent to steal, any one being therein and put in fear.**
- In what cases principal ousted by 1 *E.* 6. both in appeals and indictments. 520. *ii.* 353, 360, 361
- Where in a foreign county by 5 & 6 *E.* 6. *ii.* 353, 360, 361
- Accessaries *before* ousted. 562, 563. *ii.* 362
- If breaking be in the night, such breaking must amount to burglary, and then it ousts clergy, if it be with a putting in fear, tho no robbery *ii.* 353
- It requires an actual breaking, and an entry, to commit a felony, and so laid in indictment, and also a putting in fear. 548, 549

If

CONTAINED IN THE TWO PARTS.

If it be in the day, it must be such a breaking, as hath an actual robbery joined with it, to oust clergy ii. Page 353

In case of breaking a house in the day, committing a robbery therein, and putting in fear, tho one only enters, others present and assisting ousted of clergy. ii. 359

Robbing any person in his dwelling-house, the owner. &c. being in any part of the house, or within its precincts sleeping or waking, tho there be no putting in fear, and this extends to booths in fairs.

Principal oust by 5 & 6 E. 6. on conviction only, [but by late act in other cases]. 520

Accessaries before, where a robbery committed, and any person within the the house put in fear, oust by 4 & 5 P. & M. but not without robbery. 521, 548.

ii. 355, 360, 361, 362

Actual breaking, such as would make a burglary, and taking required, but not putting in fear. 526, 527, 548. ii. 354, 355, 362

How indictment must be laid. ii. 354

A thief coming into the house by doors open, breaks a chamber-door or counter, and takes goods, a breaking within this act, whether breaking a chest not fixed to the freehold be so. 523, 524, 526, 527

One coming to a tavern stole a cup brought him to drink in, the owner, &c. being in the house, was ousted of his clergy on this act, quare 523

Robbing a shop in Westminster-hall not within 5 & 6 E. 6. to be ousted of clergy 524, 525

Where a servant shall be be said to break the house, or not. ii. 354, 355

VOL. II.

A stranger only being in the house, clergy not ousted ii. Page 355

To what cases it extends ib.

It extends to appeal, as well as indictment ib.

Whether, on this statute, he that enters only be ousted of clergy. ii. 359

Robbery to the value of 5s. out of any dwelling-house, or out-house thereto belonging, tho none in the house.

Principal oust by 39 Eliz. 524, 525

Accessaries before not [till late statute]. ii. 357

To what cases 39 Eliz. extends. 528. ii. 357

If none in the house, or it was in the night, or he stole, but broke not the house, party shall be convict of simple larciny, but not on the statute ii. 356

Persons assisting without, but not entring, shall have clergy 526, 537, 563

An actual breaking, such as would make a burglary in the night, and a taking required. 526, 527, 548. ii. 356, 357

4 & 5 P. & M. extends not to accessaries in any offense made after 522. ii. 363

Entring by the door open, and breaking open a chest and stealing goods to the value of 5s. not ousted by this statute, nor 5 & 6 E. 6. ii. 357

Entring by outward doors open, and breaking open, unlocking or unlatching an inward door, and stealing goods to 5s. ousted of clergy on this act ib.

One breaking open a house by day, none being therein, and also breaking open a chamber-door and a chest, took out goods to 5s. and laid them on the floor, and before he could carry them out of the house was taken, ousted of clergy. ii. 358

Chamber in an inn of court domus mansionalis within this act. ib

C c

What

A TABLE OF THE PRINCIPAL MATTERS

What breaking will bring party within 5 & 6 E. 6. & 39 Eliz. which will not make a burglary. Page 527

Burning in the hand. Vide Clergy.

Burning of houses. Vide Arson.

Canon Law. Vide Laws.

Capias. Vide Outlawry, Process.

Certiorari.

CRIMINAL causes not capital, as indictments of riots committed in *Wales*, may be removed by *certiorari* into *B. R.* and when issued joined, it may be tried in next *English* county as well as in a *quo minus*. 157

Whether it lies into *Wales* on indictment of treason or felony, and for what special purposes, but not for trial of the fact, but it shall be sent down by *mittimus* according to 6 H. 8. 158

A felony or treason committed in *Durham*, a *certiorari* lies to remove it into *B. R.* out of *Durham*, and to whom it is to be directed. ib

But if the party plead *not guilty*, it shall be sent down thither to be tried. ib

Indictment of treason or felony removed out of county by *certiorari*, and party pleading, record sent down by *nisi prius* to be tried; judge of *nisi prius* may on that record proceed to trial, judgment, and execution, as justices of *gaol-delivery* by 14 H. 6. ii. 41

6 H. 8. extends to all justices as well of *gaol-delivery*, as of the peace, and enables *B. R.* to send to them the record itself, and by special mandate to com-

mand them to proceed to trial and judgment on such issue joined, as they may command justices, before whom indictment taken, to proceed, if no issue joined ii. Page 41

Appeal taken before coroner, *certiorari* how to be directed. ii. 67

If a *certiorari* issue to remove record, and *habeas corpus* the body, yet in felony, tho they be returned and filed, court may remand him and record by 6 H. 8. but in other cases record cannot be remanded, but they must proceed in *B. R.* ii. 147

But if body removed by *habeas corpus*, and record by *certiorari*, and the record not filed, tho return of *habeas corpus* be filed, a *procedendo* may issue ib

If cause and body be removed into chancery by *habeas corpus* and *certiorari* returnable there, they may be sent into *B. R.* if body only be returned with causes by *habeas corpus* into chancery, and delivered over to *B. R.* they may determine the return, and either by *procedendo* remand or grant a *certiorari* to certify record, and thereon commit or bail. ii. 147, 148

Where *B. R.* either on indictment taken before them, or removed thither by *certiorari*, may issue *cap.* and *exigent* into any county ii. 198

Barely on return of outlawry on *certiorari* without *exigent* indorsed and returned together with *certiorari*, no writ of *escheat* lies for the lord ii. 206

But if *certiorari* directed to sheriff and coroners, and *exigent* be extant in court, and they return this outlawry, possibly this may be a sufficient warrant to enter it on record, as a return on the *exigent* ii. 206, 207

Cer-

CONTAINED IN THE TWO PARTS.

Certiorari to coroners to remove outlawry after party's death, not grantable ii. Page 207

For what purposes *B. R.* issues writs of *certiorari* ii. 210

With writ of error, *quod coram vobis residet*, formerly went a *certiorari* ib.

Habeas corpus removes the body, *certiorari* the record; court on return of former cannot give any judgment, or proceed on record of indictment without record removed by the latter, but proceedings stand in same force they did, tho return be adjudged insufficient, and party enlarged; and court *below* may issue new process on indictment, tho *contra* on *habeas corpus* in civil causes, for therein it is a *superfedeas* ii. 210, 211

Certiorari's to remove indictments before justices of peace by 21 *Jac.* to be delivered at quarter-sessions in open court; recognizance in what penalty, and with what condition to be entred into, otherwise not a *superfedeas* ii. 211

By whom *certiorari* to be signed. ib.

To whom to be directed, where it issues to remove indictment taken before justices of a county palatine, or the mayor of *cinque ports* ii. 221

If they return privilege of county palatine or *cinque ports*, it shall not be allowed, but an *alias certiorari* issue, with a precept to produce their charters, whereby such exemption is claimed. ii. 212

Delivery of it doth not hinder taking an indictment after ib.

Indictments taken after *teste* of *certiorari*, and before or after delivery thereof, ought to be removed; and if court below proceed afterwards, proceedings void; and justices *below* in contempt, whether they proceed

at same sessions or private sessions after ii. Page 212, 215

Certiorari to remove all indictments against *A.* and *B.* removes all indictments wherein *A.* and *B.* are indicted, either alone, or together with any other ii. 212

Where one indictment is against divers men, and the offenses are several, as in case of indictment against divers persons for keeping several disorderly houses, a *certiorari* removes it only as to those named in it; and as to the others record remains *below*; but *contra*, if justices *per manas suas proprias* deliver the bill into court against them all, as they may, and a record be made of that delivery ii. 214

If divers be indicted, and one tender security for costs, it is sufficient ii. 212, 213

If indictment be at private sessions, it ought to be delivered into quarter-sessions, but delivery of *certiorari* at private sessions closeth hands of justices, tho allowance of writ and tender of security must be by statute at quarter-sessions ib.

Feme covert not within 21 *Jac.* to find sureties ii. 213

If *certiorari* ought to be allowed, proceedings of justices of *coram non iudice* ib.

Removal of indictment of forceable entry by prosecutor, not within 21 *Jac.* ib.

Indictment of forceable entry at sessions of the peace, and restitution awarded, and after sessions, and before restitution actually made, a *certiorari* delivered to one justice of peace; before 21 *Jac.* it closed up their hands, and no restitution was awarded, but justice made a *superfedeas* thereon; and the same law now remains on indictments of forceably entry found at private sessions ib.

A TABLE OF THE PRINCIPAL MATTERS

- Difference between writ of error and *certiorari*, as to superseding proceedings ii. Page 213
- Certiorari* a *superfedeas* from the delivery thereof for ever, unless a *procedendo* issue ib.
- In what cases variance between *certiorari* and record causeth record not to be removed. ii. 214, 215
- Tho judicial proceedings void after *certiorari* delivered, whether ministerial be so ii. 215
- Record not removed before return ib.
- After *certiorari* issued and delivered, and before record removed, inferior judge may be enabled to proceed by *procedendo* or *superfedeas* out of *B. R.* ib.
- Record removed and filed, at common law, no *procedendo* could be granted, nor record remitted; but *contra* by 6 *H. 8.* ib.
- Difference between *certiorari* in *B. R.* and chancery: In *B. R.* record itself is removed, and what remains below is but a scroll; but usually in chancery, if *certiorari* be returnable there, tenor of record only is removed; and if tenor of record of indictment, attainder or conviction be removed by *certiorari* into chancery, and thence sent by *mittimus* into *B. R.* they cannot thereon proceed to judgment or execution ib.
- Vide Habeas Corpus.
- Challenge.
- Challenge for want of freehold allowed in treasons, misprisions of treason, and murders by stat. 283
- One outlawed in trespass, neither lawful juryman, nor indictor in felony or treason. 303. ii. 155*, 277
- Whether father or son, or adversary in a suit, be a lawful juryman Page 303. ii. 155*, 277
- Jurors to be freemen, regularly freeholders 264
- Legales, i. e.* without any just exception ib.
- Division and subdivision of challenges ii. 267
- By common law, if one outlawed of felony, &c. brought error on outlawry, and assigned error in fact, whereon issue was joined, he should not challenge peremptorily ib.
- Like law, if he had pleaded any foreign plea in bar or indictment ib.
- But if one had been indicted or appealed of treason or felony, and had pleaded *not guilty*, or any other matter of fact triable by same jury, and pleaded over to the felony, he might have challenged peremptorily any jurors under the number of three whole juries ii. 267, 268
- If twenty indicted for same offense by one indictment, every prisoner allowed his challenge of thirty-five ii. 268
- If but one *venire fac.* awarded to try them, persons challenged by any one drawn against all. ii. 263, 268
- But in treason, if prisoner challenge above thirty-five, and insist on it, and will not leave his challenge, it amounts to *nil dicit*, and judgment of death shall be given ii. 268
- By 22 *H. 8.* none arraigned for petit treason, murder or felony, shall peremptorily challenge above twenty ii. 269
- In high and petit treason challenge of thirty-five now allowed, because 1 & 2 *P. & M.* restores trial of petit treason to the course of the common law. ii. 269, 339
- In petit treason, if party challenge thirty-six peremptorily, he shall have judgement of penance, as well

CONTAINED IN THE TWO PARTS.

- well in appeals as indictments,
and in case of women as well as
men ii. Page 399, 400
- As* ousting clergy in case of chal-
lenging above twenty, import,
that by such challenge party
should be convict; but yet if he
challenge above twenty, he shall
not have judgment of death, but
only his challenge shall be over-
ruled, and jurors shall be sworn
ii. 269, 270, 339, 345
- If prisoner challenge six of the ju-
rors for cause, and causes be
found insufficient, and the six are
sworn, whereby inquest remains
pro defectu juratorum, a *tales*
granted, and jury appear, the
prisoner may challenge peremp-
torily any of the six; but if it
happen, that a new cause of
challenge intervene after former
swearing, and he challenge for
cause, he must shew the cause
happened after former swearing
ii. 270, 274
- If prisoner on first pannel chal-
lenge fifteen peremptorily, and
then jury remains for default of
jurors, and a *distringas* with
forty *tales* is granted, he shall
challenge peremptorily no more
than will fill up his number.
ii. 270
- The several kinds of challenges for
cause ii. 271
- No principal challenge either to
array or poll, that sheriff or
juror is of *king's* livery, but he
must conclude to the favour.
ib.
- If alien be indicted or appealed of
felony, tho indictors ought to be
English, yet by 28 *E.* 3. trial
shall be *per medietatem linguae*,
save in felony by *Egyptians* ib.
- This statute extends as well to fe-
lonies made after as before ib.
- Extends not to trial of aliens for
treason ib.
- If alien indicted of felony plead
not guilty, and a common jury
be returned, if he surmise not
his being an alien before any of
jury sworn, he hath lost that ad-
vantage; but if he surmise it,
he may challenge the array for
that cause, and thereon a new
venire fac. shall issue, or award
be made of a jury *de medietate*
linguae; but more proper to sur-
mise it on plea pleaded. ii.
Page 272
- In treason or felony, whereto pri-
soner pleads *not guilty*, at com-
mon law four hundreders ought
to be returned ib.
- 35 *H.* 8. requiring six hundreders,
and 27 *Eliz.* requiring only two
in personal actions, extend not
to trials on indictments of trea-
son or felony ib.
- Yet never any challenge for de-
fault of hundreders on trial of
indictments for felony or trea-
son ib.
- By 33 *H.* 8. for treason or felony
committed in *king's* household,
all challenges, save for malice,
ousted ib.
- By 2 *H.* 5. none to be jurymen on
trial of capital felony, *unless* he
have a freehold of 40s. *per ann.*
above all charges, if he be chal-
lenged, and by construction it
must be land in same county.
ii. 272, 273
- He must not only be seised thereof
at time of pannel made, but
when he comes to be sworn;
else may be challenged ii. 273
- 27 *Eliz.* hath raised it to 4l. *per*
ann. yet that extends only to
issue joined in *B. R. C. B.* and
Exchequer, and justices of assize,
and not to justices of gaol-de-
livery, *oyer* and *terminer*, or the
peace; but these trials stand as
they did by 2 *H.* 5. ib.
- By statute *defectus annui census* no
challenge as to aliens, but yet
remains a good challenge to the
other half, who are denizens.
ii. 274
- By statute, on trials of felonies in
cities or boroughs, a citizen or
burgher worth 40l. personal
estate may pass, tho he hath no
free-

A TABLE OF THE PRINCIPAL MATTERS

freehold; but Knights or Esqrs. living there, not within this provision ii. Page 274

33 H. 6. of indictments of persons living in *Lancashire*, extends not to trials ib.

By statute challenge allowed of any person living in the stews of *Southwark*, tho of sufficient freehold ib.

Where prisoner challengeth for cause, he ought to shew it presently; must shew all his causes together ib.

If in trial of indictment of felony eleven be sworn, and the twelfth challenged, whereby inquest remains, &c. and a *distringas* with a *tales* issues, and jurors appear, *king* shall not challenge any of the eleven sworn, save for cause happened since their swearing; if it happen before, tho not known till after, it shall not be allowed; jurors to be called, as they happen in the pannel ib.

Same law for challenge by prisoner for cause ib.

Of trial of a challenge for cause made to the poll. ii. 274, 275

If a juror be challenged before any juror sworn, by whom, and how challenge tried, and by whom the next and the rest of the challenge tried. ib.

If plaintiff challenge ten, and prisoner one, how challenge tried. ii. 275

If six sworn, and rest challenged, by whom challenges tried ib.

In discretion of court, by whom array to be tried ib.

In trial of peers no challenge allowed ib.

Tho *king* pardons an infamous man, he shall not be a juryman ii. 278

Prisoners to challenge jurors before they are sworn ii. 293

If juryman, before he be sworn, take information of the case, it is cause of challenge ii. 306

In petit treason, 1 & 2 P. & M. restores peremptory challenge

of thirty-five; if prisoner challenge above thirty-five, he by that statute should have had his clergy, being *casus omisus*, but clergy now ousted by 4 & 5 P. & M. ii. Page 339

In inquests of office, no challenges ii. 378

Vide *Jury, Dute.*

Chancery.

As to *English* proceedings is no court of record; but processes under great seal in order thereto are matters of record 649

By virtue of order made for commitment of one, till he enter into bond, &c. warden of fleet may justify imprisonment of party ii. 122

Chancellor hath no power to proceed in criminal causes ii. 147

Habeas corpus ad faciendum & recipiendum, issued by chancellor to remove persons arrested in civil cases unwarranted by law, and as to persons in execution prohibited by statute ii. 148

For *habeas corpus ad subjiciendum* issuing out of chancery. Vide *Habeas Corpus.*

For *Certiorari*. Vide *Certiorari.*

Cheats.

Receiving money by *false tokens* punishable at common law, or by statute 506

One maiming himself for a colour to beg, how punished 412

Civil subjection. Vide *Coverture, King, Master, and Servant, Parent and Child.*

Civil Law. Vide *Laws.*

Clergy.

A relaxation of the severity of judgment of law 517

In

CONTAINED IN THE TWO PARTS.

- In manslaughter committed by husband and wife, formerly he had clergy, but the not. *Page* 46
- In some treasons antiently allowed 181, 185, 186. ii. 326 to 329
- But never in treasons touching king's person. 223, 517. ii. 330, 334
- In *petit treason* and murder, in what cases, as verdict, &c. taken away, both in appeals and indictments, from principal and accessory *before*, not *after*. 382, 450, 466. ii. 129, 336 to 343, 344
- By 1 *Jac.* of *stabbing*, he who stabs only ousted, and in what cases, both in appeals and indictments, but in all other cases of manslaughter allowed. 468. ii. 344, 345
- If he, that actually gave the stroke, be indicted as present and assisting to another supposed to have given it, and be convict, on such indictment he shall have his clergy; *contra* in murder. ii. 344, 345
- Knowingly aiding and comforting a jesuit out of hold, ousted. 336, 688
- Servants embezzling their masters goods formerly had clergy. 505. ii. 367
- Clergy allowed till 25 *E.* 3. *pro clero*, in all treasons and felonies not touching king himself, save in two felonies, *viz.* *insidiatio viarum* & *depopulatio agrorum* & arson, clergy allowed in former by 4 *H.* 4. 517. ii. 328, 332, 333, 335, 346
- 25 *E.* 3. *pro clero* made *Hillary* in same year ii. 330
- Indictment and evidence must both bring case within *act* ousting clergy, otherwise allowed 517, 525, 526, 535. ii. 336
- If felony be so laid as to come within *act*, yet if evidence come not up to it, where prisoner is to be found guilty only of simple felony ii. 336
- Robbing in or near the highway, whether on appeal or indictment, and in what cases, as verdict, &c. ousted of clergy *Page* 517, 518, 519, 535. ii. 348 to 351
- Accessaries *before*, not *after*, ousted. 519. ii. 350
- Indictment, *in vel prope*, sufficient to ascertain clergy 535
- Where accessory *before* ousted of clergy, *a fortiori* principal. 522. ii. 246, 247
- Horse-stealing, principal and accessories *before* and *after* oust in all cases. 528, 529. ii. 364, 365
- Larceny from the person, *clam* & *secrete*, principal ousted, but not accessories; if under 12*d.* it remains petit larceny. 529. ii. 365
- Acts ousting clergy alter not the offense, but oust clergy where offense capital, as in grand larceny 531
- Voluntary escape, rescue and breach of prison within clergy, tho principal felony not 599, 607, 612
- Rape, principal oust, but not accessories *before* or *after* 633. ii. 345
- Formerly prisoner standing mute, or not directly answering, had his clergy ii. 345
- Forceably carrying away women and marrying them, principals and accessories *before*, ousted 661
- Whether receiver being made principal by statute, be ousted. *ib.*
- Acts ousting clergy from 24 *Apr.* 1 *H.* 8. repealed by 1 *E.* 6. save in cases excepted, which see 667, 679
- Forging a deed after former conviction and judgment, ousted. 682, 686
- Clergy allowed without special words to oust it. 704. ii. 334, 335
- Restored to grand larceny committed within king's palace, tho party convict by 33 *H.* 8. ii. 7

A TABLE OF THE PRINCIPAL MATTERS

- And to *breaking king's house with intent to steal*, tho arraigned according to that *act* ii. Page 7
In all crimes within 28 H. 8. for trial of treasons, &c. done on the sea, clergy allowed, save in *treason, piracy and murder.* ii. 17
- Justices of *nisi prius* may allow clergy to a convict of manslaughter ii. 41
- What words in indictment of *murder* oust clergy. ii. 129, 187, 344
- By 8 & 18 *Eliz.* clergy discharges all offenses precedent within, but not without clergy ii. 254, 387, 388
- By 18 *Eliz.* *burning in the hand*, substituted in lieu of delivery to the ordinary ib.
- As to *acts* ousting clergy in case of *challenging above twenty*, party shall not have judgment of death, his challenge only over-ruled ii. 270
- If judgment of *peine fort & dure* be given, yet if offense within clergy, clergy allowed ii. 320, 380
- Judge ought to allow it (tho strictly prisoner ought to pray it), and prays it not ii. 321, 378, 379, 381
- Antiently clergy prayed and allowed on arraignment of prisoner, now rarely done but on conviction or standing mute ii. 323, 377, 378
- Claim by clergy of exemption from secular jurisdiction growing intolerable, how they were abridged therein ii. 325
- In civil suits had no exemption, save by special *acts*, from arrest, by *cap. on stat merchant* ib.
- If on *distringas* one was returned *clericus beneficiatus non habens laicum feodum*, process issued to bishop to bring him in ib.
- In cases criminal, not capital, as trespass, petit larciny, &c. *privilegium clericale* not allowed ii. 325, 326
- By canon laws nuns were exempt from temporal jurisdiction, but whether by common law; other women had no privilege of clergy, but by statute shall be burnt in the hand ii. Page 320, 328, 371, 372
- Ordinary but a minister; king's courts judges of allowance or disallowance of clergy and purgation ii. 328, 380, 381
- In what cases they would often deliver clerk to the ordinary *absque purgatione* ii. 328, 329
- If ordinary admitted him in such cases to his purgation, he was finable, and party delivered by such purgation recommitted to prison ii. 329
- If clerk had his clergy, and was generally delivered to the ordinary, he might admit him to make his purgation, and on *significavit* into chancery a writ issued to sheriff to deliver party his goods and chattels seised, *nisi fugam fecerit eâ occasione* ii. 329
- Where new felony made by statute, clergy incident thereto ii. 320, 330
- Clergy allowed before 25 *E. 3.* in *treason for counterfeiting the seal and coin.* ii. 331, 332
- In all treasons, whether declared by 25 *E. 3. de proditionibus*, or made since, clergy ousted. ii. 332
- Clergy allowed in sacrilege after 25 *E. 3. pro clero*, but if ordinary refused the clerk, he had not his clergy ii. 333
- Sacrilege not ousted at common law ii. 366
- But ousted by 23 *H. 8.* 517. ii. 333, 365
- 4 & 5 *P. & M.* extends not to it ii. 366
- A statute generally enacting, that a crime shall be felony without clergy, or that offender shall suffer as in felony without clergy, clergy ousted to all intents ii. 335
- Acts

CONTAINED IN THE TWO PARTS.

- Acts ousting clergy construed strictly ii. Page 335, 371
- Clergy ousted as to principal, not ousted as to accessory; if as to accessory *before*, not as to accessory *after*; if where prisoner is convict by verdict, it holds not as to conviction by confession, nor attainder by outlawry, nor standing mute. ii. 334, 335
- Every indictment to oust accessory *before* of his clergy on 1 & 2 P. & M. must run *malitiose*. ii. 339, 342
- Where *act* ousting clergy mentions indictments, but not appeals, appellee within clergy ib.
- Whether clerk attaind of *petit treason* by outlawry may claim his clergy, and be delivered to the ordinary as a clerk attaind without purgation ii. 341, 342
- In robbery committed on a man's person, those, who are present and assisting as well as taker, ousted ii. 359
- How far piracy and felonies on the sea ousted of clergy ii. 368, 369, 370
- Piracy, being not taken notice of as felony by common law, was not thereby ousted of clergy ii. 270
- Exemption of clergy extendible to admiral's jurisdiction before 28 H. 8. ib.
- How much of 33 H. 8. ousting felonies in king's household of clergy, repealed by 1 E. 6. ib.
- By statute of bigamy, *Bigamus* ousted of clergy, but now shall have clergy ii. 372
- At common law, if clerk convict had broke bishop's prison, and been after taken, he had lost his clergy ib.
- Clerks convict are now to be burnt in the hand, and discharged ib.
- By antient law prisoner, not having *habitum & tonsuram clericalem*, had not his clergy ib.
- Or ordinary might have refused him, if he could read ii. 372, 373
- Heretick, convict, a Jew or Turk shall not have clergy; *contra* of one *excommunicate* ii. Page 373
- A Greek or Alien shall have his clergy, and read in a book of his own country ib.
- So shall a *bastard*, one *blind* ib.
- By 4 H. 7. one not in orders that hath once had his clergy, shall be burnt in the hand, and shall not have his clergy again; but a clerk in orders shall have his clergy a second time ii. 373, 389
- How clerks in orders shall prove themselves such ib.
- None ousted of clergy a second time by the bare mark; if prisoner deny himself to be the same person that had his clergy, how tried ib.
- Of holy orders and inferior orders, or *clerici in minoribus*. ii. 373, 374
- Clergymen, whether principals or accessaries. have now no more privilege than laymen, save that they are not burnt in the hand; but *quere*, whether, if attaind by outlawry, they shall have more privilege than laymen ii. 374, 375, 376, 389
- Tis a mistake, that if a clerk in orders challenge above twenty, he shall lose his clergy a second time ii. 376
- By 1 E. 6. Peers to have clergy, but for first offense not to be burnt in the hand, or put to read ib.
- How they must pray their clergy; how court to be ascertained of their peerage 376, 396
- This *act* extends not to clergy ousted by any subsequent statute, but to what cases ib.
- Whether it extends to felonies within the same, where they cannot make purgation, as if they abjure, confess, or be outlawed ii. 276, 277, 390
- Never meant that a peer should be put to read, or burnt in the hand in any case ii. 376, 377
- Clergy

A TABLE OF THE PRINCIPAL MATTERS

- Clergy allowed to an attain. *Page*
521. ii. 379
- Where judges may allow clergy
under the gallows, if they go
that way; but whether it may
be done by justices of *oyer and*
terminer after their sessions, *quæ-*
re; but they may reprieve him,
and allow him clergy at the
next session *ib.*
- If one cannot read, and *non legis*
be recorded, and court reprieve
him to another sessions, and in
the mean time he learns to
read, he shall have his clergy
ib.
- So if judgment of death be entred
upon *non legit* returned *ib.*
- One *abjuring* after his return shall
have his clergy *ib.*
- Approver* disavowing his appeal,
vanquished in battle or recreant,
shall have his clergy *ib.*
- If ordinary return *non legit*, court
may give him the book and
hear him, and so in absence of
ordinary *ii. 381*
- Judge usually appoints verse the
clerk shall read *ib.*
- The entry of clergy *ii. 382*
- By 18 *Eliz.* a convict within cler-
gy forfeits all his goods he had
at the time of conviction, tho
burnt in the hand *ii. 388*
- Yet may purchase and retain other
goods, and on *burning in the*
hand shall be restored to his
lands *ii. 388, 389*
- If king pardon it, he may pur-
chase and retain goods *ii. 389*
- After clergy and *burning in the*
hand, a clerk in orders shall not
be proceeded against by eccle-
siastical judge to deprivation, or
other censure, for it amounts
to a pardon *ib.*
- He shall have same privilege as if
he had been *burnt in the hand*
ib.
- Plea of *auterfoits convict*, and had
his clergy, as good bar as before
18 *Eliz.* *ii. 390*
- A conviction of manslaughter, and
that he was a clerk and ready to
read, if court would have allowed,
a good bar to an appeal, tho
court had called him to judg-
ment, but continued him on a
curia advisare vult. *ii. Page*
390
- How prayer of clergy entred *ib.*
- Where principals and accessaries
before ousted of clergy in proper
burglary. Vide Burglary.
- In what cases, as verdict, &c. and
under what circumstances princi-
pals and accessaries before ousted
in special or improper burglaries,
or not. Vide subdivisions under
Burglary.
- Vide Felonies by Statute, &c.
- Clerk of the Crown, Assise and
Peace.
- To certify into *B. R.* names of
persons outlawed, attain, or
convict *ii. 36, 37*
- Tho clerks of assise enter respites
and awards of execution only
in a book of *Agenda*, yet re-
gularly are supposed to be en-
tered of record, and these me-
morials are warrants for such
entries *370*
- Clipping. Vide Coin.
- Coin.
- A dissertation on the coin and
coinage of *England* 188 to 210
- What *sterling* imports, what the
standard of it 188, 189, 203,
204
- Weight, allay, and intrinsic value
of coin *inter jura majestatis* 191,
192, 204
- Franchises of coinage antiently
granted by the king 191, 192
- Where proclamation necessary to
inhanse or decry coin, &c. 196,
197, 198
- Where necessary to make foreign
coin current, and what evidence
to prove it legitimate 197, 198,
213, 310, 316, 327
- How

CONTAINED IN THE TWO PARTS.

- How impairment in weight and allay may happen *Page* 205
- Payment in *numero*, *ad scalam*, *ad pensum*, explained *ib.*
- Dealbare firmam* expounded 206
- Difference between so much *numero*, and so much *blanc* 206, 207, 208
- Exportation of bullion, gold and silver, not felony, but causes a forfeiture 654 to 657
- Counterfeiting foreign coin legitimate by proclamation, treason 192, 210, 211
- Counterfeiting foreign money not legitimate, not treason within 23 *E. 3.* but misprision of treason 210
- Whether counterfeiting *farthings* or *halfpence* be within 25 *E. 3.* *ib.*
- What shall be said the *king's* coin 211, 212
- What evidence that it is such 196, 197, 213, 310
- In what cases the *minters* guilt of treason 213
- Not compassing, but actual counterfeiting, treason 214
- Yet if many conspire, and one counterfeits, treason in all *ib.*
- Receiver not a principal in this treason 233
- Uttering counterfeit money pursuant to agreement precedent to the fact, treason 214
- One knowing counterfeiter, and uttering the false money after the fact without such agreement, is *quasi* a receiver of him *ib.*
- Barely uttering false money knowingly is only a cheat, and not misprision; but to know counterfeiter and conceal it, misprision 214, 373, 375
- Knowledge of the fact, and bare concealment, misprision only 214
- Counterfeiting the *stamps* barely [till late act], not treason *ib.*
- Counterfeiting coin, without uttering, treason 215, 228
- Tho in another metal, and with a different impression to elude the law, treason 215
- Clipping, washing, or impairing foreign coin legitimate by proclamation, treason 5 *Eliz.* but no corruption of blood, or loss of dower *Page* 215
- Whether clipping, &c. *king's* coin be treason within 25 *E. 3.* material as to judgment *ib.*
- How the law stood with respect to clipping, washing, &c. from 25 *E. 3.* 215 to 222
- Falsifying, impairing, scaling, or lightning *king's* coin, or foreign coin legitimate, treason by 18 *Eliz.* but without corruption of blood, or loss of dower 218, 219
- What evidence necessary on 5 & 18 *Eliz.* against impairing and clipping foreign coin to prove it legitimate 213
- Indictment for clipping or impairing, &c. must pursue 5 & 18 *Eliz.* and how conclude 220
- Two witnesses not necessary, either on trial or indictment 221, 297, 298
- Irish* coin of baser allay, tho *king's* coin, not current here 221, 222
- Whether counterfeiting it be treason within 25 *E. 3.* 211
- But clipping, &c. *Irish* coin here, treason 221, 222
- How counterfeiters of coin punished before 25 *E. 3.* and how since 222 to 225
- Knowingly importing false money *ad instar* the *king's* coin, with intent to merchandize or pay, treason; by what intent to be tried 225, 228, 229, 317
- Counterfeiting out of the realm triable by statute in *B. R.* or before special commissioners; but otherwise at common law 225
- Importing counterfeit coin from *Ireland*, or the *Isle of Man*, not treason 225, 226, 317
- Antient statutes against importing false money 226, 227
- This offense never settled to be treason before 25 *E. 3.* which makes only the apporters and their

A TABLE OF THE PRINCIPAL MATTERS

- | | |
|---|--|
| <p>their aders, traitors, but not receivers at second hand <i>Page</i> 227</p> <p>Knowingly importing false money <i>ad instar</i> foreign legitimate coin, treason by 1 & 2 P. & M. 227, 228</p> <p>Counterfeiting foreign coin not current here, a substantive misprison of treason by 14 Eliz. 228, 376</p> <p>Command. Vide Principal and Accessary.</p> <p style="text-align: center;">Commission.</p> <p>Justices of gaol delivery sit one day, and forget to adjourn their commission, or clerk to enter it, and a felony being done next day, they proceed in sessions, and take indictment, and give judgment of death, it is erroneous, and record not amendable 498, 499. ii. 156*</p> <p>Where necessary to enter adjournment or not; session relates to first day, and no longer; records entred as of first day 499. ii. 24, 261</p> <p>Where proceedings of judges in capitals, without strict extent of their commissions, or where determined, is a great misprison 498, 499</p> <p>King dies after commission of gaol-delivery issued, they subsist till notice 499. ii. 24, 25</p> <p>By what means commission of gaol-delivery determined ib.</p> <p>Of the different kinds of special commissions of <i>oyer and terminer</i> ii. 10 to 22</p> <p>Commission <i>pro hac vice</i> may continue their session from day to day by adjournment ii. 24</p> <p><i>Supersedeas</i> suspends power of commissions, but <i>procedendo</i> revives it ii. 25</p> <p>Where a special new commission determines a former general commission <i>pro tanto</i> ii. 20, 25</p> | <p>Where a general and special commission are dated same day, both stand ii. <i>Page</i> 26</p> <p>A commission of one nature supercedes not commission of another ib.</p> <p>All associations are commissions ii. 40</p> <p>Former commissions were determined by new ones at common law ii. 401, 404</p> <p>In which case record and prisoner were removed into B. R. who ceased where justices left off ii. 404</p> <p>By 11 H. 6. proceedings before justices of peace, not discontinued by new commission ii. 405</p> <p>Nor before justices of <i>gaol-delivery</i>, and <i>oyer and terminer</i> by 1 E. 6. ib.</p> <p>Vide Admiralty, Court, Gaol-delivery, Justice of Assize, Justice of Peace, King's Bench, Oyer and Terminer.</p> <p style="text-align: center;">Commitment.</p> <p>One bailed or committed not to be discharged till convict or acquitted, or delivered by proclamation 583</p> <p><i>Mittimus</i> ground of felony in case of breach of prison ib.</p> <p>Ought to be in writing under seal, unless by court of record; if not, what the effect 583, 584, ii. 122</p> <p>It must express the cause, and if felony, the <i>species</i> ib.</p> <p>Tho cause not inserted, gaoler in false imprisonment may aver that it was for felony 584, 585, 609. ii. 123</p> <p>Ought to be to the common gaol of the county; but if offense committed, and party taken within a franchise, then to gaol <i>there</i> by statute 585. ii. 123</p> <p>If it expresses larciny above value or manslaughter, tho in fact only petit larciny, or <i>se defendendo</i>; escape, felony 609</p> <p style="text-align: right;">Suf.</p> |
|---|--|

CONTAINED IN THE TWO PARTS.

Sufficient, if it be generally for felony Page 609, 610

Antiently more committed without *mittimus* than with it 610

Mittimus not of so antient date as justices of peace ib.

Tho no cause exprest, sufficient that gaoler or prisoner hath a proper notice of offense to make voluntary escape or breach of prison felony 610. ii. 123

In chancery, if order be made for commitment, till party enter into bond, &c. warden of fleet may thereby justify imprisonment ii. 122

Proper to mention name of justice and his authority in beginning of *mittimus*, tho not always necessary ib.

It must have a certain date of the year and day, and an apt conclusion ii. 122, 123

Those things are regular, *viz.* cause, justice committing, date, apt conclusion, yet warrant not void, that hath not all these circumstances 584, 585, 609. ii. 123

If conclusion be till further order by justice, it binds not up hands of other justices, *quoad* bailing or delivering prisoner ib.

Sometimes justices sendailable prisoners, not having their bail ready, to some private prison, as new prison, &c. till they can find bail; but this disliked by the judges ib.

If prisonerailable, justices not to demand, but prisoner to tender it, otherwise justice may commit him ib.

Vide Arrest, Breach of Prison, Escape, Justice of Peace, Rescue.

Computation.

Of the year, day, and waft 360

Of the year and day wherein to bring appeal 427

Concealment.

For concealments by grand inquest. Vide Jurp.

Vide Disprison.

Condition. Vide Forfeiture.

Confession.

Court not to record confession of infant under twenty-one, but to put him to plead *not guilty*, or inquire by inquest of office of the fact Page 24

Voluntary confession of treason before a privy counsellor or justice of peace, sufficient to satisfy 5 & 6 E. 6. not necessary to be in court 304

A simple confession is a conviction; but court, if crime ousted of clergy, usually advise party to plead ii. 225

If it be but an extrajudicial confession, tho it be in court, as where prisoner freely tells the fact, and demands opinion of court, whether it be felony, tho it appear to be felony, court will not record his confession, but admit him to plead to felony *not guilty* ii. 225, 226

Consent. Vide Principal and Accessary.

Constable. Vide Arrest, Justice of Peace, Peace-officer, Homicide, Murder and Manslaughter.

Constable and Marshal.

Judices ordinarii of cases within martial law; their jurisdiction defined 500

Where it is murder to execute another by martial law in time of a peace 499, 500

Neither

A TABLE OF THE PRINCIPAL MATTERS.

Neither soldiers, nor mariners on land or at sea, in actual service, to be capitally proceeded against by martial law in time of peace Page 500

Leges maritimæ differ from martial law; by those admiral had jurisdiction in capital offenses committed on the sea ib.

Construction.

For construction of grants. Vide Grants.

For construction of statutes. Vide Statutes in General.

Conviction.

Where second offense subject to severer punishment than former, there must be a previous conviction of former 324

Where forging a deed after former conviction, is felony by 5 *Eliz.* it must be conviction by judgment 384, 682 to 687

Presentment by grand inquest not sufficient conviction of a negligent escape 603

What a proper conviction thereof ib.

Vide Pleas, Verdict.

Coroner.

Whether inquisition before him of flight be traversable 363, 414, 415. ii. 63, 64, 301

Where his inquest, as to flight, shall be taken for the king, before that of a petit jury 363, ii. 63, 154, 301

Such inquests only *quasi* inquests of office 363. ii. 63, 154, 301

Has power to inquire of accessaries before, but not after 363, 416. ii. 63, 65

Two in a county, whether outlawry to be given by one or both; one may take inquisition *super visum corporis* 417. ii. 56

Inquisition *de villis A. &c.* without saying *de quatuor villatis proxime adjacent*, according to statute inquisition good; statute only directory; coroner to issue precept to constable to summon jury, twelve at least Page 416. ii. 59, 152*

By statute to return inquisitions taken by him to next *gaol-delivery*, or *B. R.* 418. ii. 58

Where one is killed *per infortunium*, but not by man, what he is to enquire of 418, 419

One drowned in a pit, he may charge township to stop it, and enter it in his rolls; and if not done before next *gaol-delivery*; township amerced 422. ii. 62

If he on notice refuse to inquire of one come to a violent death, how and before whom punishable 424. ii. 58

Ought to inquire of death of one dying in gaol 432. ii. 57, 157

Ought to hear evidence on both sides 415. ii. 60

Where coroner ordered to inquire *de novo super visum corporis* 415. ii. 59, 60

Where a writ of *melius inquirendum* shall, or not be granted 415, 416. ii. 59, 60, 69

In homicide by necessity, the matter may be specially presented, either by grand or coroner's inquest, and thereupon party presently discharged, without being put to plead; but he may be indicted again, if matter of former indictment false; *contra*, where indictment simply of murder or manslaughter 491, 492

Whether inquisition *super visum corporis*, finding one *felo de se*, be traversable 414, 415. ii. 59, 60, 154

If body cannot be seen, death inquisible before justices of oyer and terminer, or peace 414, 419

Where either coroner of county, or admiral may take inquisitions in great rivers ii. 16

Stroke

CONTAINED IN THE TWO PARTS.

Stroke in one county, death in another, justices, or coroner of county where party died, shall inquire and proceed, as if stroke in same county. *Page* 426, 427

ii. 66

B. R. is sovereign coroner in *England*

ii. 5

Coroners may attach manslaughterers by their warrants after inquisition, finding them guilty

ii. 107

May also make out warrants for taking persons, that neither are, or can be presented before them, as persons present and not guilty; and also burglars and robbers, tho they cannot take an inquisition touching them

ib.

If it be found *super visum corporis*, that the felon fled, and was killed in the flight, this presentment, tho after party's death, is conclusive as to forfeiture for the flight

ii. 154

11 *H.* 4. of the return of inquests extends to coroners inquests

ii. 60, 61, 155*

Inquest to be *probi & legales homines*, and of the proper county

ii. 167

Where two coroners in a county, in ministerial acts return to be by both

ii. 104

Justices of *oyer and terminer*, or of peace cannot assign a coroner, as justices of *gaol-delivery* may

ii. 32

Coroner may take indictment of *se defendendo*

ii. 46

Three kinds of coroners, and who they are

ii. 53

Mayor of *London* by charter coroner thereof

ib.

Bishop of *Ely* hath power to make them in the *Isle*

ib.

By statute power of electing coroners confirmed to counties, yet a saving to *king* and other lords, who ought to make such coroners

ib.

So *king* may grant coroners within certain precincts; and lords of franchises, having power to nominate them by charter, may

still do it without election

ii. *Page* 54

Admiralty and verge by *king's* grants have power of granting, or having coroners

ib.

Of death of man, or other articles belonging to coroner, arising on the high sea, inquisitions have been usually taken by coroners appointed by *king*, or his admiral, and coroners of county have no jurisdiction

ib.

Inquisitions taken before coroner of admiral are returned before commissions on 28 *H.* 8. and inquisition before coroner of county are returned before commissioners of *gaol-delivery* for the county

ib.

Coroner of the verge, or of *king's* house, by who nominated, his power; coroner of county by statute to join in inquisition of death of a man, what case excepted

ii. 54, 55

But he cannot take inquisition without coroner of verge; but both offices united in one, inquisition taken before him is good; and if court remove, he may proceed on the inquisition, as coroner of county

ii. 55

In what case coroner of household shall take inquisition without coroner of county by a jury of the household; the return and proceedings on these inquisitions regulated by statute

ib.

General coroners of counties, how and where eligible, and how to be sworn

ib.

How to be qualified

ib.

Their office not determined by *king's* demise

ib.

Being elected by freeholders of county, if they be sufficient, whole county shall answer

ii. 55, 56

Some counties have more, some fewer; by statute each county of *Wales* two, and *Chester* two

ii. 56

If there be above two in a county, and a writ is directed *coronatoribus*,

A TABLE OF THE PRINCIPAL MATTERS

- ribus*, tho one dies, whilst plural number remains, a return by the coroner is good; but if only one survive, he cannot execute and return it till another made
ii. Page 56
- But if two coroners in a county, or more, one may execute the writ, as in case of an *exigent*; but the return must be in the name of *coronatores* ib.
- Coroners amoveable for cause, and new ones may be chosen by writ, tho cause not traversable; yet if false, they may have a *superfedeas* to the new writ ib.
- Their power of proceeding to trial or judgment in pleas of the crown, or execution upon outlawry, taken away by *Magna Charta* ii. 56, 66
- Of what they yet retain a jurisdiction ii. 57
- Regularly have no power to take inquisitions, but *de subito mortuis*, and some special incidents ii. 65
- If one die of hunger, and vill bury him before coroner sent for, it shall be amerced; *contra*, if of a fever or apoplexy ib.
- If vill leaves a body, that died of a violent death, above ground unburied, it shall be amerced: such amercements may be set on presentment of grand inquest, or coroner ib.
- If prisoner die in *king's* bench prison, clerk of the crown, who is coroner of that court, is to view the body ii. 58
- Coroner must take inquisition in person, or else it is void ib.
- What inquisition to contain ib.
- If body buried before he come, what he ought to do in such case, cannot take inquisition, otherwise than *super visum corporis* ii. 58, 66
- If he take inquisition without view of the body, he may take second inquisition upon view of it; second good, first void ii. 58, 59
- But if first be taken on view, second is void ii. Page 59
- In default of coroner, who may inquire of a *felo de se*, or other sudden death; justices of peace, or *oyer* and *terminer* may inquire thereof, and so may *B. R.* but then that presentment is traversable ib.
- If constables make not a return of coroner's precept, or jurors appear not, constables or jurors in default, by whom amerced ib.
- Jurors not challengeable by either party ib.
- 11 *H. 4.* extends to these inquisitions; and if a juror be outlawed, tho but of trespass, this a good plea to coroner's inquest of murder ii. 60
- Of what matters jury charged to inquire ii. 60, 61
- If one be killed by another, and it be certainly known that he killed him, it hath been held, that jury must hear evidence only for the *king*, and jury must find it murder, tho justifiable or excusable *homicide*; but this practice neither warranted by law nor reason ib.
- His inquest rather for his information of the truth of the fact, than for an accusation ii. 61
- Tho prisoner may be arraigned on coroner's inquest finding it murder or manslaughter, yet bill of murder may be preferred to grand inquest, and thereon he may be arraigned and tried, tho coroner's inquest comes up only to manslaughter, &c. ib.
- Antient practice hath been for coroner's inquest to find the matter, as they judge it ib.
- Difference of penning 1 & 2 *P.* & *M.* of examinations taken by justices of peace and coroner ib.
- Whole evidence to be returned with inquisition ib.
- Several kinds of sudden, violent deaths ii. 62

If

CONTAINED IN THE TWO PARTS.

- If inquest find he died *ex visitatione Dei*, or *per infortunium*, what only to be done. ii. Page 62
- In no case coroner sets any fine or amercement, but only presents it to next *gaol-delivery*, who impose it. ib.
- If inquest find one *felo de se*, what they are further to find and do. ib.
- First finder of body to be bound over to next *gaol-delivery*. ii. 62, 63
- If party slain and felon not known, inquest to find accordingly; what the antient manner of inquiry. 63
- If felon known, and inquisition found him guilty, what were the proceedings. ib.
- One found guilty by coroner's inquest, or that he fled, they are to inquire of his goods and chattels; and antiently coroner was presently to seise and inventory the goods, and deliver them to *villata*; how far altered by 1 R. 3. ib.
- Coroner must commit persons found guilty by inquest to sheriff, who is to send them to gaol by statute. ii. 64
- If any present found not guilty, what duty of coroner. ib.
- If parties found guilty as principals or accessaries *before* be not to be found, he might antiently have proceeded to have outlawed them. ib.
- That practice altered by statute; justices of *gaol-delivery* are to proceed against offenders, if in gaol; if not, then to certify inquisition in *B. R.* and thence process of outlawry is to issue on that inquisition. ib.
- By statute coroner to take examinations against principals and accessaries *before*, and put them in writing, and bind over witnesses to next *gaol-delivery*, and then to return their examinations, recognizances and inquisitions. ii. Page 64
- One indicted on coroner's inquest is found not guilty, petit jury to inquire who killed the deceased, which serves as indictment against him; and if they cannot tell, they commonly give in some fictitious name. ii. 65
- If there be an inquisition of murder or manslaughter, and also indictment of same offense, and party is arraigned and acquitted on indictment; necessary to quash inquisition, or arraign party upon it, who is to plead *autrefois acquit*, or not guilty, and so be acquit on that also; otherwise he may be outlawed on record thereof. ib.
- But if both of same nature, and for same offense, and be good, he may be tried on both at once. ib.
- Where coroner is to have a fee, or not. ib.
- Hath power to take inquisition of escape. ii. 62, 65
- Hath no power to take inquisition of any other felony than death of a man and the incidents, except in *Northumberland*. ii. 65, 66
- Where he may take appeals of other matters. ii. 66
- In cases not felony, what formerly he might have taken inquisition of. ib.
- May take confession of one that breaks prison, and on his record party to be hanged. ib.
- Had power to attach one that had dangerously wounded another, and not only on appeal of *mayhem*, but *ex officio*. ib.
- What appeals coroner may take; they must be of facts within his county. ii. 67
- Appeal to be by bill in proper person, and before coroner and sheriff. ib.
- Yet coroner principal judge, and *certiorari* may be to him alone, D d or

A TABLE OF THE PRINCIPAL MATTERS

or to him and sheriff; but not to sheriff alone, neither for appeals nor outlawries, unless in *London* ii. Page 67

What coroner may do upon an appeal ib.

Whether he may outlaw defendant in appeal ib.

When appeal sued before coroner and sheriff, for determination it must be removed into *B. R.* ib.

Has power to take accusation of approver ib.

He may on appeal by approver take his appeal against any one for any felony or treason in any county ii. 67, 68

If appeal in same county, coroner may make a precept to sheriff to take appellee ii. 68

But if he be only coroner of a franchise, whether he may make precept to sheriff to attach him ib.

Cannot make precept to bailiff of the franchise, because he cannot execute process within his franchise, but by sheriff's mandate ib.

How that is to be remedied ib.

If appeal be of felony out of the county, it must be removed to justices of *gaol-delivery*, and they may make process into any county to take appellee ib.

Vide *Amercements, Arraignment, Felo de se, Forfeiture.*

Corporation.

For forfeitures by corporations.
Vide *Forfeiture.*

Vide *Franchise.*

Corruption and Restitution of Blood.

Corruption of blood effect of judgment in high, petit treason, or felony, except saved by statute

354

Several ways of saving it Page 703

Tho there be a clause to save it, *king* to have forfeiture of lands during felon's life, and his goods; no escheat to the lord, where inheritance saved to the heir, it virtually makes heir inheritable, and wife dowable 703,

704

One attain of piracy on 28 *H. 8.* no corruption of blood, unless indictment formed, as of a robbery at common law, and how to be for that purpose 354, 355.

ii. 18

If one be attain by course of civil law before admiral for treason or felony on the sea, or constable and marshal for treason, &c. beyond sea, it works no corruption of blood 355. ii. 18

But attainder of treason or felony done on the sea, on 28 *H. 8.* by jury, as well as attainder of foreign treason on 25 *H. 8.* corrupts the blood 355. ii. 17,

18

By *Westm. 2. de donis conditionalibus*, tenant in tail attain of felony or treason, there is no corruption of blood as to the issue, save for their benefit 356

Son of donee in tail, attain of treason *in vita patris* dies leaving issue, estate shall descend to grand child; *contra* of a fee-simple ib.

In all cases, but entails, attainder of treason or felony corrupts blood upward and downward

356

Father and two sons; elder attain dies *improles in vita patris*, younger shall inherit; *contra*, if elder survive the father, except elder an *alien nee* 356, 357

One hath two sons, and then is attain, elder purchaseth, and dies *sine prole* in life, or after death of father, his attainder hinders not descent from brother to brother 357

Same

CONTAINED IN THE TWO PARTS.

Same law, if father was first attaint, and then had two sons

Page 357

Two brothers; elder is attaint, and hath issue, and dies in life of younger; younger dies *improles*, his lands in fee shall not descend to his nephew ib.

So if son of party attaint purchase land, and die without issue, it shall not descend to his uncle ib.

Judgment of *peine fort & dure* corrupts not the blood ii. 319

Tho a pardon restores not blood, yet as to issues born after, it is a restitution 358

But restitution in its true extent can only be by *parliament* ib.

Such *acts* construed liberally ib.

Tho it be to restore *B.* only as heir to *A.* it restores also his lineal and collateral heirs ib.

Vide *Forfeiture, Felony by Statute, Statutes in General.*

Coverture.

A *feme covert* indicted of a misdemeanor may be fined and imprisoned 20

But in assise, if she vouch a record, and fail at the day, she shall not be imprisoned ib.

Command of husband exempts not wife in treason, murder or manslaughter 45, 47, 434, 516

But if she commit larciny or burglary with him, she is to be acquitted 45, 516

Yet coercion is only presumed till contrary appears ib.

Wife accessory *before* to a murder committed by husband, not excused 47

Her assent to his treason makes them both principals ib.

Where he may be accessory to her, but not she to him ib.

She cannot be accessory *after* with him to a felony, nor commit treason by receiving a traitor jointly with him, unless she consent to the treason 47, 48

She may be guilty of misprision of treason of a stranger; but whether concealing her husband's treason be misprision Page 43

Baron and *feme* joint lessees of a term, he kills himself, she shall not hold it against *king* or *almoner* 413, 414

Council.

Who antiently were the *king's legal council* 421

Where prisoner allowed to have council. Vide *Arraignment.*

Counterfeiting Coin. Vide *Con.*

Counterfeiting Great Seal, Privy Signet and Privy Seal. Vide *Seal.*

Counterfeiting Sign Manual. Vide *Sign Manual.*

County.

Where amerced in default of vill and hundred 448, 603

Where stroke in one county, and death in another, by statute justices or coroner of county where party died, shall inquire and proceed 427. ii. 163

Appeal may be brought in either county 163

Goods stolen in one county, and carried into another, party indictable for larciny in foreign county, but not of robbery 507, ii. 163

Intire felony done in two counties dispunishable, yet misprision thereof punishable in either 651, 652, 653

Essential, that felony or treason be tried in proper county, except otherwise provided by statute 158. ii. 163

33 *H. 8.* of trial of treason and murder in a foreign county, repealed as to the former, but in force D d 2

A TABLE OF THE PRINCIPAL MATTERS

- force as to the latter *Page* 283.
 ii. 22, 163, 164
 Whether receipt of felon, after attainder in same county, makes an accessory *sans* notice 323, 622
 By statute accessory indictable and triable in county, where accessory 427, 623. ii. 163
As making a felony, and ordering trial where party taken, without negative words, party may be indicted where offense done 694, 695, 705
 Making a new felony of offense, consisting partly in the realm, partly out; where trial to be 706
 By 35 *H.* 8. foreign treason, misprisions and concealments thereof, triable in *B. R.* by a jury of county, where court sits, or before such commissioners, and in such shire as *K.* shall appoint, by a jury of such shire 283, ii. 164
 Peer of *Ireland* tried *here* by a *Middlesex* jury for a treason *there* 155
 By 28 *H.* 8. treasons, felonies, murders and confederacies committed on the sea, or in a place where admiral hath jurisdiction, triable where *king* shall order 282. ii. 16, 17
 Certain *acts* for trial of treasons and misprisions thereof (committed in *Wales*) in the next *English* county, and where *king* should appoint, repealed 282
 What crimes committed in *Wales* justices of peace and *gaol-delivery* in *English* counties adjacent have cognizance of 157. ii. 38
 Where special commissions of *oyer* and *terminer* may be limited to particular rivers extending into several counties; but then every county must have a particular session *pro tanto* ii. 21
 Where indictment taken before justices of *oyer* and *terminer* in proper county, may be determined by special commission in a foreign county; but jury must be of proper county ii. *Page* 21, 22, 27
 Where offender may be executed in a foreign county 502
 In what county offender against 8 *H.* 6. making *avoiding records* felony, shall be tried 652
 Offender against 3 *H.* 7. in taking away in one county, and marrying in another, where indictable 660
 If a mortal stroke had [before 2 *G.* 2. been given at sea, and party died in body of county, neither admiral nor common law had jurisdiction 426. ii. 19 to 21, 162
 Treasons by 37 *Eliz.* by priests, &c. coming into *England*, and felony for receiving them, indictable and triable where offender taken ii. 164
 So is felony by statute for taking a second husband or wife, the first living *ib.*
 If one, by reason of tenure of lands in *com. B.* be bound to repair a bridge in *com. C.* he may be indicted in *com. C.* *ib.*
 Foreign pleas by statute triable by a jury of same county, where party indicted, except in treason ii. 239, 263
 Where stroke in one county, and death in another, indictment to be where death was ii. 262
 Where admiral hath jurisdiction *infra corpus com.* Vide *Admiralty*.
For arrests in proper or foreign counties. Vide *Arrest*.

County Palatine.

 Felony or treason committed in *Durham*, removeable in *B. R.* by *certiorari*; but on pleading *not guilty* remandable 158
 They of *Durham* claim exemption from being sworn out of precinct of that county palatine *ib.*
 Of treasons and felonies in *Tindal* and *Hexamshire* *ib.*
 By

CONTAINED IN THE TWO PARTS.

By several *acts* outlawries of treason, &c. in *Lancashire*, caused not a disability of the parties, but are repealed by 33 *H. 6.*
Page 286

How indictors in *Lancashire* to be qualified, where indictment supposes party inhabiting out of it, or where indictment is taken out of it against persons residing there 286. ii. 152*

All powers in county palatine and franchises for making justices of assise, gaol-delivery, or peace, resumed by 27 *H. 8.* 286. ii. 38, 211, 212

Under what seals the commissions now pass 286

Processes to be in *king's* name, under whose *teste* ib.

Indictments to conclude *contra pacem regis* ib.

All processes of outlawry, attainder, &c. in county palatines, now of same effect, and induce same forfeitures, as if offense done, tried and determined in any other *English* county ib.

Royal forfeitures of treason not touched by 27 *H. 8.* ib.

Justices sitting within exempt franchises or counties palatine, now *king's* courts and his justices ii. 38

Certiorari issuing out of *B. R.* to be obeyed by justices sitting in *Durham*, or within *cinque ports* ii. 38, 211, 212

They shall hold their session *within such liberties, and not elsewhere* ib.

None within such liberties compellible to appear out of same before other justices ib.

Where such franchises were anti-ently granted to abbots, there is a special commission of *gaol-delivery* for that franchise ib.

Restriction of *sitting within franchise* extends not to commission of *oyer and terminer* ii. 38, 39

This resumption extends not to cities and boroughs ii. 39

Vide *franchise, Certiorari.*

Court.

In dubiis rather to incline to acquittal than conviction. *Page* 300, 509

Not bound to take notice at another *sessions* that a man is attaint 545

Ought not to be transported with heinousness of offense 87, 636

Of the court before lord high steward for trial of peers ii. 7

Amplly treated by lord *Coke* ib.

Exposition on 33 *H. 8.* for trial of *treasons* and *felonies* within *king's* palace before steward of household, and on subsequent *acts* derogating from it ii. 8, 9

Of commissions of *oyer and terminer* for the verge, the extent and manner of trial of felonies within same ii. 10, 11

Can only proceed on indictments taken before themselves, and not on coroner's inquests, and therefore have in same commission one of *gaol-delivery* ii. 11

Where such commission determined by general commission of *oyer and terminer* in same county with notice, and where this special commission determines the general *pro tanto* of county, as within verge ib.

Commissions for verge refused ii. 11, 12

If penalty be recoverable in any of *king's* courts of record, *act* extends only to the four *superior courts* ii. 29

Where the words, *no wager of law, essoin, protection, &c.* shall be allowed, tie up jurisdiction to courts, that can allow protection, &c. ii. 30

Where penalty made recoverable by original writ, it is restrained to superior courts, tho many contrary instances ib.

Where one attaint is brought into another court, execution not to be awarded against him, till demanded what he can say against it 368

A TABLE OF THE PRINCIPAL MATTERS

By 3 H. 7. imagining and conspiring to kill the *king*, or any of his council is made felony; who the only judges, and by whom presentment and trial must be
Page 663

All courts, having judicial power by common law, or statute, have power to grant warrants for arresting felons, but such as are simply ministerial, and have no jurisdiction, as constables, cannot issue warrants ii. 105

Custom of the court of B. R. part of the law of the land ib.

Vide Admiralty, Certiorari, Commission, Gaol-delivery, Justices of Assize, of Peace, King's Bench, Oyer and Terminer.

Day and Night.

DAY and Night defined 550,
551
Crepusculum explained 550

Deer.

Where it is lawful to shoot them 40

Demise of the King. Vide Commission, King.

Demurrer. Vide Pleas.

Deodand.

Described; how applied 419
Not forfeit till death found; cannot be claimed by prescription, and why ib.

On death by misadventure, what inquest to inquire of ib.

Villata, chargeable with process for *deodands* or *value*, tho not delivered to them ib.

Sword, &c. of a stranger forfeit ib.

Distinction between *deodands moventia ad mortem* & *quiescentia* Page 420, 421

What moveable things shall be *deodands*, or not ib.

What things not moveable 422

Where there shall be *deodand*, where party slain is within age of discretion, or not ib.

Where a ship, &c. shall be a *deodand*, or not 422, 423, 424

Discontinuance.

Indictment not discontinued by *king's* death, tho in some cases process be ii. 189, 209

Where prisoner hath pleaded *not guilty*, and then makes default, whereon *exigent* is awarded, first issue is discontinued ii. 224, 225

Domus Mansionalis. Vide Burglary.

Dower. Vide Forfeiture.

Drunkennes.

Where it excuseth or not 32

Duress. Vide Necessity.

Engleshery.

EXPLAINED 447, 448

Error.

Erronious judgment in treason given by one that had authority, was at common law reversible by writ of error 353

By 29 Eliz. secures all former attainders, where party executed, from such reversal, but meddles not with other attainders ib.

Neither doth 33 H. 8. take away writs of error on attainder of treason ib.

26 H. 8.

CONTAINED IN THE TWO PARTS.

26 H. 8. & 5 & 6 E. 6. take away from one outlawed in treason reversal of outlawry, because party out of the realm, but extends not to other offenses

Page 354

Misnomer in civil action not error ii. 175

But outlawry of one indicted without addition, or by a false one, erroneous ii. 176

Writ of error, a *superfedeas* to the issuing execution from delivery of writ till day of return past; but if plaintiff proceed not to removal of record, execution shall be granted for his delay ii. 213

Where *auterfoits acquit* assignable for error, as well as pleadable ii. 221, 243, 251

One outlawed, on alledging error in law or fact to satisfaction of B. R. shall have a respite of execution to purchase writ of error, and be remitted to marshal in mean time ii. 408

Amicus curiæ may inform B. R. of any error in the outlawry ib.

Vide Outlawry.

Escape.

One mortally wounded, offender in custody of constable, who suffers him to escape before death of party; no felony in constable, tho he dies within the year 427, 591

One escaping is supposed always in custody 581

Gaoler voluntarily suffering a traitor to escape, treason 234

Wilful escape by gaoler, no felony, if *mittimus* not in writing under seal; but *contra*, where commitment by court of record 583, 584

Nor is it felony, except cause expressed in *mittimus*, or offense be notified to gaoler 578, 584, 595, 596, 610

An unapt conclusion of *mittimus* excuseth not gaoler from felony Page 595

The several sorts of escape 590

Voluntary escape defined 590, 591

It becomes same crime, as party was committed for, viz. treason or felony ib.

It is felony, tho party be not convicted or attain, but till then gaoler shall not be arraigned, tho he may be indicted 591, 598. ii. 254

Felony committed, constable takes one on suspicion, and voluntarily lets him go at large, it is felony, tho party not indicted 592

Tho officer after arrest be assured of party's innocence, he may not safely discharge him, but bring him before a justice ib.

He discharges him at his peril, if felony committed, and party guilty ib.

A convict of petit larciny suffered to escape, no felony ib.

The same law of escape of one committed for, or convict of homicide *se defendendo* ib.

But if commitment or indictment be for *manslaughter*, tho in truth but *se defendendo*; yet *prima facie* escape indictable as felony, tho *in eventu* otherwise ib.

One indicted of murder is pardoned or acquitted within the year, but left in gaol till year elapsed, on 3 H. 7. and within year, gaoler suffer him to escape, it is felony *prima facie*, for possibility of appeal; but if not brought within the year, or party be acquitted thereon, gaoler to be acquitted 593

Escape before clergy allowed; felony; but party retaken, and clergy had, felony purged ib.

Clergy had, and prisoner continued for further correction by 18 Eliz. escape fineable ib.

If A. commit a felony before B. who neither takes him, nor attempts it, not felony in B. 594

A TABLE OF THE PRINCIPAL MATTERS

- If *A.* commit a felony, and *B.* knowing it receive him, and then suffer him to depart, no escape by *B.* Page 594
- Gaoler refusing to receive a felon from constable, constable lets him go, it is an escape ib.
- Private man, on delivering felon to constable or vill, is discharged; so are constable and vill on delivering him over to sheriff, or his gaoler 594, 595
- Custody of felon belongs to old sheriff till turned over by indenture ib.
- A private man knowing *B.* to have committed a felony arrests him, and wilfully suffers him to escape, felony; or a felony being done, he arrests *B.* on suspicion, and then lets him escape, felony *in eventu* 595
- If *mittimus* contain no cause, gaoler not bound to receive felon ib.
- A private man carrying felon to the common gaol, acquaints gaoler by word only that it is for felony, gaoler chargeable on escape. 596
- Constable wilfully suffering felon to escape from the stocks, felony ib.
- Prisoner rescued, gaoler dispunishable ib.
- Where in case of fire, enemies or rebels escape by gaoler, is excusable ib.
- Admitting bail, where it ought not, where a negligent escape, where wilful 596, 597
- If gaoler voluntarily licence felon to wander out and return, if he return before gaoler indicted, it is a misdemeanor; but whether a voluntary escape 597
- Sheriff fineable for wilful or negligent escape by his gaoler 597, 598
- But not for escapes by gaolers in particular franchises; these concern themselves and their lords only 598
- Officer permitting escape, *quasi* accessory Page 598
- If principal be found not guilty, or guilty of a fact not capital, or be only convict and not attaint, and hath his clergy, gaoler shall be discharged of felony, but fined 598, 599. ii. 254
- Voluntary escape within clergy, tho principal felony not 599
- Escape makes but one felony, tho principal offender indicted of several ib.
- But if two be indicted of one felony, and escape, gaoler indicted severally for both ib.
- If offense, for which party was committed, appear not by matter of record, necessary a felony be done, or else escape no felony; but *contra*, where it appears by a record ib.
- If it appear by record, how indictment to be, and how, if otherwise ib.
- Calling record of prisoners over as in *B. R.* sufficient to convict of a negligent escape, but not voluntary, except gaoler confess 599, 603
- By whom country to be amerced for an escape 600
- Division of negligent escapes ib.
- Negligent escape fineable, what the measure of the fine 600, 602, 604
- What shall be said a negligent escape 601
- If prisoner break gaol, it is a negligent escape ib.
- Where lawful to fetter prisoners ib.
- If private man arrest a felon, who escapes by force, without his default, he is excused ib.
- Officer bringing prisoner to gaol, prisoner rescueth himself, how far officer excused 601, 602
- If felon in carrying to execution be rescued, sheriff punishable 602
- Gaoler may take prisoner seven years after, tho out of his view, but

CONTAINED IN THE TWO PARTS.

but that excuseth not negligent escape Page 602
 Having once lost view, it is an escape, tho taken after; but if gaoler take him on fresh pursuit, and hath still the view, no escape ib.
 Gaoler fined for negligent escape may retake felon, but fine not discharged ib.
 What a proper conviction of a negligent escape 603
 Sometimes coroner's roll ib.
 Presentment by grand inquest not sufficient, because officer finable ib.
 Presentable in aleet, but they cannot set a common fine or amercement; but it may be removed in *B. R.* where amercement may be set ib.
 Executors fined for negligent escape in their testator 604
Escapium, and the franchise to be quit thereof, explained 604
 Coroner hath power to take inquisition of escape ii. 62, 65
 If private man discharge one suspected, whom he hath arrested, without bringing him to justice or constable, it is an escape ii. 81
 If felon not once in the hands of the officer that hath warrant to arrest, no escape; but yet it may be an escape in township, for which they shall be amerced ii. 93
Vide Amercement, breaking Prison, Evidence, Indictment, Rescue.

Estoppel.

Where defendant is indicted, and pleads to indictment by a wrong name, that estoppel shall avail sheriff or officer, that doth execution ii. 175
 So in a civil action, if defendant appear by wrong name, sheriff in false imprisonment shall have like advantage ib.

Evidence.

How coin proved current Page 196, 197, 204, 212, 213
 How foreign coin proved legitimate 197, 198, 213, 310, 316
 Intention how to be proved 229
 Where by 1 & 2 *P. & M.* Informations taken before justices of peace may be read in evidence against a prisoner 305, 306, 586. ii. 284, 285
 Whether, if informant was bound over, and appear not, they may be read 305
 Whether justices of peace of a foreign county may transmit such informations before justices of *gaol. delivery* of proper county 305, 306. ii. 285
 As to examination of prisoner, it must be testified, that it was without menace or undue terror ii. 285
 Depositions taken in a cause of divorce, offered to prove force on indictment for forcible marriage, rejected, and why 306. ii. 285
Hear-say no evidence, but from offender himself ib.
 In murder *A.* indicted, as having given the mortal stroke, *B.* and *C.* as present and assisting, if proved that *B.* gave the mortal stroke, and *A.* and *C.* were present and assisting, it maintains indictment, and all ousted of clergy; but *contra*, on indictment on 1 *Jac.* of stabbing; for he, that gave the stroke, shall have his clergy on such indictment 437, 463. ii. 185, 292, 344, 345
 Whence evidence of malice must arise to constitute murder 451, 452
 Where malice in law maintains indictment of murder 460. ii. 292
 What circumstances are evidence of a *felonious intent* on indictment of larciny 508, 509
 Thieves come to rob *A.* and force him by *menace* of death to go and

A TABLE OF THE PRINCIPAL MATTERS

- and fetch them money, which he doth, it maintains a general indictment of robbery *Page* 532, 533
- In indictment of robbery *violenter* must be both alledged and proved 534
- What evidence to maintain indictment for a *felonious escape, breach of prison, or rescue* 599
- Ravisher, having kept the woman as a concubine before the supposed *rape*, evidence of assent 628, 629
- What concomitant circumstances necessary evidence of a *rape* 633 to 636
- On indictment of *second forgery* to make it felony, record of first conviction by *judgment* must be proved 686
- If alledged, that party was killed with a sword, and proved that he was killed with another weapon, indictment maintained; but *contra*, if by another kind of death, as strangling, &c. ii. 185
- Whether an information taken in treason can be read in evidence on indictment of treason ii. 286
- By 21 *Jac.* mother of bastard-child concealing its death, shall suffer as in murder, unless she prove by one witness, that child was born dead ii. 288
- Indictment need not alledge, but it must be proved on evidence that she concealed it, if advantage be taken of this statute ii. 289
- If no concealment proved, left to jury to inquire by circumstances, whether she murdered it or not; but it doth not put her under an absolute necessity of proving it born alive by one witness; so evidence stands but as at common law ib.
- If on view of child it be testified by one witness from probable circumstances, that child was not come to its *debitum partus tempus*, this is proof by one witness, that child was born dead, so as to leave it to the jury, as upon a common law evidence, whether she was guilty of death, or not; what such circumstances are ii. *Page* 289
- In some cases presumptive evidences go far to prove party guilty, but better five guilty persons escape unpunished, than one innocent man die ib.
- Cautions against convicting on doubtful evidence, with instances of innocent persons having suffered thereby 300, 509. ii. 289, 290
- Not fit to convict any man for stealing goods *cujusdam ignoti*, merely because he cannot give an account how he came by them, unless due proof made, that a felony was committed of those goods ii. 290
- Nor to convict any one of murder or manslaughter, unless fact proved to be done, or body found dead ib.
- Variance between indictment and evidence in *county* material, but not in *vill* ii. 291
- If evidence in case of murder differ from indictment *in specie mortis*, it doth not maintain indictment; as if indictment be for killing by poison, and evidence be of killing by stabbing; but *contra*, if indictment vary in species of the poison, or indictment be for killing with a sword, and evidence be of killing with a staff or gun; effectual word in both *percussit* ib.
- And same law with respect to accessories to such principals ii. 292
- If *A.* and *B.* be indicted as principal, and *C.* as accessory *after* to both, *A.* and *B.* are convicted, or only *A.* is convicted, and on the evidence against *C.* it appears he was only accessory to *A.* it maintains indictment ib.
- One indicted on 1 *Jac.* against stabbing, if it appears on evidence,

CONTAINED IN THE TWO PATRS.

- dence, that person killed struck first; yet good evidence to convict party indicted of manslaughter ii. Page 292
- If one be indicted of petit treason for killing his Master, tho he were not such, he may be found guilty of murder, and tho not *ex malitiâ præcogitatâ*, he may be found guilty of manslaughter, and *not guilty* as to the petit treason ib.
- If one be indicted of burglary, and *quod felonice & burglariter cepit bona, &c.* he may be acquit of the burglary, and found guilty of simple felony, if evidence riseth no higher ii. 293
- If one be indicted of murder *ex malitiâ præcogitatâ*, evidence proving killing on a sudden falling out, is good to find him guilty of manslaughter ib.
- What evidence the jury shall have out with them or not. Vide *Jury*.
- Vide *Indictment, Verdict, Witness*.
- Examination.* Vide *Confession, Evidence, Justice of Peace*.
- Execution and Reprieve.**
- Where one attaint is brought into another court, or reprieved to another sessions, execution not to be awarded, till first demanded, what he can say against it 368
- Execution of drawing to be on a hurdle 382
- Antiently without any thing under ib.
- A stranger of his own head executes a criminal, murder 501
- Execution must pursue judgment, otherwise murder 501. ii. 411
- Who are the ordinary ministers in execution of malefactors 501. ii. 409, 410
- What warrant issued out by *lord high steward* for execution of a peer 501. ii. 409
- How many commissioners of *oyer and terminer* formerly signed warrant, where they gave sentence Page 501. ii. 409
- Leaving a calendar with sheriff, the only warrant now ii. 409
- No warrant under seal of justices of *gaol-delivery* for execution, but only a calendar 501. ii. 409
- What warrant for execution was antiently issued, or awarded by them ii. 409
- J. Rolle* would never subscribe calendar, but after judgment command sheriff in court to do execution, and for not doing it fined a sheriff 2000l. 501. ii. 31, 410
- A prisoner removed in *B. R.* by *habeas corpus*, or taken on indictment of felony in *Middlesex* is committed to the marshal, arraigned and adjudged to die; court may send him to *Newgate*, and command sheriff to do execution 502
- But if remitted to the marshal, (as regularly he ought) then marshal is proper officer, and may execute party in *Middlesex*, wherever offense committed; and court may *ore tenus*, or by order command sheriff to assist 464, 502. ii. 5
- How entry to be for marshal to do execution 464, 502. ii. 409, 411
- They that give judgment may award execution ii. 406
- Therefore *B. R.* on removal of prisoner and record, may give judgment, and award execution ii. 406, 407
- B. R.* never gives judgment against any, not in *custodia mariscalli* ib.
- How warrant for execution to lieutenant of the tower to be ii. 410
- Sheriffs of *London* and *Middlesex* to be assisting ib.
- If party revive after being cut down, he must be hanged again ii. 412
- Judge

A TABLE OF THE PRINCIPAL MATTERS

- Judge hath power to reprieve, *before* or *after* judgment, infant convict of capital offense in order to *king's* pardon Page 19
- Of Reprieves *ex arbitrio regis*; how the *king* may command a reprieve 368. ii. 412
- Ex arbitrio judicis*; judge may reprieve one *attaint* of treason before him, but ought to be cautious in doing it ib.
- After he hath granted it, may command execution after sessions and adjournment of commission 368. ii. 412, 413
- Reasons for a reprieve ii. 412
- Of reprieves that are *quasi de jure*, or *necessitate legis* ii. 368, 413
- In respect of pregnancy; duty of judge, before he finishes his sessions to demand of every woman *attaint* of treason or felony, what she has to say against execution ib.
- What incidents to a plea of pregnancy in *retardationem executionis* ib.
- Enseinture* with quick child being found, execution to be respited till another sessions, but no stay of execution, except woman with quick child 368, 369
- If she once hath had benefit of this reprieve, and be delivered, and afterwards be with quick child again, she shall not have a further respite 369
- If jury of women find her quick, whereas she was not at all with child, if next sessions happen, so as to render it impossible, that she could be with child, but must be delivered *mesne* between former sessions and this, she shall be executed, otherwise not ib.
- Such juries prone to favor the women ii. 413
- If she were not quick with child, when such verdict given, nay, tho not then with child at all, but became quick before second sessions, she shall have a second reprieve in *favorem prolis* 369
- But gaoler punishable in the latter case. ii. Page 413
- When the *fœtus* shall be said to be quick ib.
- In all cases of reprieves for pregnancy, judge to make a new demand, what prisoner has to say against execution; after delivery she must be brought to the bar again for that purpose, which must be at the following sessions 369, 370. ii. 413, 414
- Reprieves ought to be matter of record, and tho she be delivered before next sessions, sheriff not to make execution ii. 413
- Nor ought judge to give such direction ib.
- If *mesne* between judgment and award of execution, offender becomes *non compos*, a jury shall be sworn to inquire *ex officio*, whether counterfeit or not 35, 370
- What parts of execution for treason may be abated by *king's* warrant under great or privy seal, &c. 370. ii. 412
- If jury convict against or without evidence, and against direction of court, court may reprieve the convict before judgment, and and certify the *king* for his pardon ii. 309, 310
- In what cases prisoner not to have execution awarded, till he be demanded what he can say against it ii. 407, 408
- Where one outlawed shall have a respite of execution, till he can purchase a writ of error ii. 408
- Where clergy may be allowed under gallows to one wrongfully attaint, if judge come that way ii. 379
- This may be done by judges of *B. R.* as justices of peace; but *quære*, whether by justices of *oyer* and *terminer* after their session ended ib.

Vide Judgments.

Execu

CONTAINED IN THE TWO PARTS.

Executors.

Term for years not extinguished
by accession to an executor, who
hath the fee, because *en autre*
droit Page 250
Fined for negligent escape in their
testator 604

Exigent. Vide Outlawry, Pro-
cess.

Falsifying Attainders.

WHERE alienee may not only
falsify attainder, in point
of time of treason or felony, but
also offense itself 361
Not concluded by confession of
alienor ib.
Purchaser *mesne* between time of
felony committed and attainder
by verdict cannot falsify in point
of offense, but time ib.

Fealty. Vide Allegiance.

Fear. Vide Necessity.

Felo de se.

Must be of age of discretion, and
compos mentis at time of giving
the mortal stroke 411, 412
What shall be said age of discre-
tion. Vide Infant.
For *non compos mentis*. Vide Idiot.
Why inquisition runs *felonice* 411,
412
Death must ensue within year and
day after stroke 412
Lunatick killing himself in a fit of
lunacy cannot be a *felo de se*;
contra, during a lucid interval
31, 412
There must be an intent to com-
mit the fact 412
What shall be said a voluntary
killing 412, 413, 480, 481, 493
Villain gives himself a mortal
stroke, lord seisseth goods, king
shall have them 414

He forfeits his goods and chattels,
but not his lands, nor wife's
dower Page 414

Baron and *feme* joint lessees of a
term, he kills himself, she shall
not hold it against king or almo-
ner 413, 414

How the forfeiture shall relate ib.
There must be an inquisition to
intitle the king; if the body
cannot be seen, conviction to be
before justices of *oyer* and *ter-*
miner, or *peace*, and then tra-
versable; but if it can be seen,
then before coroner *super visum*
corporis, and whether traversable
414 to 418

Where inquisition *super visum cor-*
poris quashed, and coroner or-
dered to inquire *de novo* 415

Where party found to have died
per infortunium, and suggested
on part of king or almoner, that
he was *felo de se*, writ of *melius*
inquirendum denied; if granted,
would have been void ib.

What default of coroner's inqui-
sition shall be supplied by this
writ ib.

Process may be made against those
who detain the goods in the in-
quisition 416

Vide Coroner, Deodand.

Felony by Common Law.

Open resistance of justices of *oyer*
and *terminer*, felony 146
Every felony includes misprision,
and offender may be indicted of
the latter only 652, 708
Vide Arson, Breach of Prison,
Burglary, Escape, Felo de se,
Homicide, Larceny, Murder
and Manslaughter, Rescue,
Robbery.

Felony by Statute.

Westm. 2. de uxore abducta sive
raptâ cum bonis viri, makes it
felony 637
Ex-

A TABLE OF THE PRINCIPAL MATTERS

- Exposition thereon *Page* 37 to 640
- Wife voluntarily going away with a stranger, and taking husband's goods, felony in neither; but trespass in the stranger 637
- Judgment of death antiently given in a civil action brought on this *act*, but disused 638
- If defendant convicted in this action, it antiently served for indictment ii. 150*
- Articuli super cartas* make purveyors felons in certain cases 639, 640
- But purveyance now taken away 640
- 14 *E.* 3. makes it felony in gaoler by duress of imprisonment to make one become approver against his will, clergy allowed 640, 641
- But extends not to a gaoler *de facto* 641
- 18 *H.* 6. makes exportation of wool and woollfells other than to the staple of Calais or streights of Morocco, felony; clergy allowed; *quære* whether in force 642, 653
- 37 *E.* 3. makes stealing falcons, &c. felony, what proof required; within clergy 642
- 5 *H.* 4. c. 4. multiplication of gold and silver, clergy allowed 644
- Cap. 5. malicious cutting out tongue, or putting out eyes, clergy allowed 645
- 3 *H.* 5. coining or bringing in gally-halfpence, suskins or dodkins ib
- 2 *H.* 6. Payment or receipt of blanks, clergy allowed; now disused ib
- 3 *H.* 6. Congregation of masons to prevent statutes of labourers, but acts relating thereto repealed ib
- 33 *H.* 6. Servants after master's decease, taking and spoiling his goods, clergy allowed 653
- Wherein extended beyond the letter 654
- 1 *H.* 7. Hunting with vizors, and rescuing such hunters; exposition thereon 656 to 659
- 3 *H.* 7. Imagining and conspiring to kill the king, or any of his council, clergy allowed 661 to 664
- Who a felon for conspiring the death of any, and what great persons within this *act*; who the only judges, by whom presentment and trial, and where trial to be *Page* 663
- 1 *E.* 6. repealed all new felonies enacted *tempore H.* 8. & 1 *M.* repealed the same, and the new created felonies *tempore E.* 6. 308, 309, 664
- But neither extended to piracy, or any *act*, which did not constitute a new felony, but only directed proceedings in old felonies with respect to clergy, trial, &c. 308, 309, 664, 665
- A division of statutes of *H.* 8. & *E.* 6. constitutive of new felonies 665
- Which of these never after revived or re-enacted ib
- Which repealed, but re-enacted with or without alterations ib
- Some offenses made felonies before *H.* 8. but extended farther by *acts* in his time, and then old felonies stand, but additional repealed by 1 *E.* 6. & 1 *M.* ib
- 21 *H.* 8. Servants embezzling goods delivered to them; 27 *H.* 8. ousting clergy, being repealed by 1 *E.* 6. clergy allowed [how far ousted by 12 *Ann.*] 666, 667
- This *act*, but not 27 *H.* 8. revived by 5 *Eliz.* 667
- 22 *H.* 8. 2 & 3 *P.* & *M.* Cutting powdike, clergy allowed 669
- 1 & 2 *P.* & *M.* Egyptians above fourteen remaining here a month, 5 *Eliz.* ousts clergy 670, 671
- 18 *H.* 6. Soldiers retained, as prescribed by the *act*, departing from their captains without licence 671
- 672
- 2 *E.* 6. *ad idem* 674, 675
- Exposition on the several *acts* making departure of soldiers, mariners and gunners *sans* licence, felony 671 to 681
- A mariner or gunner, who hath taken *prest*, and departs *sans* licence, hath clergy 678, 679
- Where a soldier departing without licence shall have his clergy, or not

CONTAINED IN THE TWO PARTS.

not Page 677 to 681
A division of *aets* tempore Eliz.
 making new felonies 681, 682
 8 Eliz. Sending sheep beyond sea
 after former conviction, clergy
 allowed 687
 27 Eliz. Receiving, retaining, or
 maintaining a popish priest know-
 ingly; no clergy 336, 614, 615,
 688
 31 Eliz. Imbezelling king's armour;
 within clergy ib
 Exposition thereon ib
 35 Eliz. cap. 1. A recusant refusing
 to abjure, or after abjuration to
 depart, without clergy ib
 Exposition on this *aet* 688 to 690
 Circumstances necessary to be al-
 ledged and proved 689, 690
 ——— Cap. 2. A popish recusant
 refusing to abjure, or after abju-
 ration to depart; without clergy
 690
 39 Eliz. 1 Jac. Dangerous rogue
 banished, or adjudged to the gal-
 lies, returning sans licence, with-
 in clergy 691
 But branded rogue begging or wan-
 dering, ousted of clergy ib
 39 Eliz. Wandering soldiers or ma-
 riners, or idle persons wandering
 as such; felony in certain cases,
 no clergy 691, 692
 1 Jac. cap. 1. Witchcraft; no
 clergy 694, 695
 ——— Cap. 4. Subjects passing sea
 to serve foreign prince, without
 taking oath directed: clergy al-
 lowed 696
 ——— Cap. 21. Of murder of ba-
 stard children. Vide Evidence,
 Indictment.
 ——— Cap. 26. Acknowledging fine,
 recovery, deed inrolled, statute, or
 recognisance, bail, or judgment
 in name of another not privy to
 same; clergy ousted, but no
 corruption of blood or loss of
 dower ib
 Bail taken, but not filed not with-
 in this *aet* [but since made felo-
 ny] ib
 ——— Cap. 31. Going with plague
 sore, but discontinued 695, 696

*Statutes enacting felonies continued
 down from the time the author
 wrote till this time* Page 697 to
 703

Vide Breaking Prison, Bug-
 gery, Burglary, Forcible
 Marriage, Forgery, Polyga-
 my, Rape, Record, Statutes
 in general, &c.

Fine.

All *aets* speaking of fines or ran-
 som at king's pleasure, mean of
 king's Justices 375

Presentment of a negligent escape
 by grand inquest not sufficient
 to convict officer, because he
 must be fined; but sufficient for
 an amercement of a vill 603

Where executors were fined for a
 negligent escape in their testa-
 tor 604

What the measure of a fine for a
 negligent escape ib

Where a prohibitory *aet* makes a
 penalty recoverable by action of
 debt, but mentions not indict-
 ment, party may be indicted,
 but fine not to exceed penalty
ii. 171

Force. Vide Necessity.

Forcible Entry.

If one be indicted for a riotous and
 forcible entry *contra formam stat.*
 and the statute is misrecited; in-
 dictment quashed ii. 171, 172

Justices by statute may make resti-
 tution on indictment found at
 private sessions before any quar-
 ter-sessions happen ii. 213

For removal of indictment of forcible
 entry by certiorari. Vide Cer-
 tiorari.

Forcible Detainer.

If one hath been in possession of a
 house for three years, he may de-
 tain it by force, by 8 H. 6. 445

Forcible

A TABLE OF THE PRINCIPAL MATTERS

Forcible Marriage.

By 3 H. 7. Taking a woman against her will and marrying her, made felony Page 614, 659
 Exposition on this act 614, 659 to 662
 Accessories before and receivers principals 614, 661
 To what women it extends or not 660
 Taking away in one county and marrying in another, where offender indictable ib
 Marriage with consent excuseth not, if first taken away against her will ib
 She may be a witness, tho a wife *de facto* 301, 302, 660, 661
 Principals and accessories before ousted of clergy 661
 Whether receivers of such women be ousted of clergy 614, 661

Forfeiture.

Forfeiture of goods for treason same as for felony; but some difference as to grants of goods so forfeited 239
 Forfeiture of lands for treason 239 to 259, 356
 At common law lands intailed forfeited for treason, and so by 26 H. 8. & 33 H. 8. now in force 241
 In the case of grandfather, father and son, grandfather is tenant in tail, father attaint of treason dies first, the lands shall descend to the grandchild; father could forfeit nothing, and 26 H. 8. corrupts not the blood by attainder of the father ib
 If after 26 H. 8. and before 33 H. 8. which vests all in the king without office, tenant in tail had been attainted of treason, and had died in that interval, the lands would have descended to the son till office found; but *contra* in case of tenant in fee-simple attainted, and dying before office; in this case freehold

is cast on king without office, and none can take it else

Page 242

King at common law and by 26 H. 8. was intitled to a right of entry, where party was in merely by disseisin or abatement, but not to a right of entry, where possessor was in by title; but by 33 H. 8. king is intitled to right of entry in both cases, and that without office; but there must be inquisition or seisure to bring king into actual possession ib
 If king grant over before such seisure, how grant is to be, or else void ib
 One committing treason hath then a bare right of action touching lands, or a right to reverse judgment given against him, or to bring a formedon or writ of entry, but hath no right of entry without recovery in such action; this right neither by common law, nor 33 H. 8. is given to the king by attainder of treason; *sed quære* ib
 Tenant in tail of the gift of H. 7. reversion in the crown, made a feoffment in fee, and then was attaint of treason, and died, leaving issue; the feoffor against his own feoffment could not claim any right at time of the treason, yet there remained in him a right of intail forfeited to the king; and king is in as of his reversion, which is not subject to leases duly made by tenant in tail before his attainder 242, 243
 Tenant in tail general makes a feoffment to the use of himself in fee, and before 26 or 27 H. 8. commits treason, and is attaint, and dies, leaving issue inheritable to the intail, then a special act is made, whereby he was to forfeit all estates and rights; tenant in tail can have no right against his own feoffment; but when estate returns to him, that is forfeited by the attainder;

CONTAINED IN THE TWO PARTS.

- attainder; and *king* shall hold this estate discharged of the right of old intail, and that shall never revive to the issue; retrospect of *king's* title by attainder shall over-reach and avoid the *remitter* wrought in the issue before *king's* actual seisin by the attainder, or office thereon
Page 243
- King* makes a gift in tail, saving reversion to himself, attainder of treason of tenant in tail barred not his issue, because of 34 *H. 8.* which derogates from 26 & 33 *H. 8.* 243, 244
- But 5 & 6 *E. 6.* being *puisne* to those *acts*, makes lands of the gift of the *king* in tail subject to forfeiture for treasons 244
- At common law *king* not intitled to a condition of re-entry in party attain; but in what cases he is intitled to such a condition, or not, by 33 *H. 8.* 244 to 248
- Title to a condition of re-entry described 244
- Difference, where condition is tied up to the person, or not 244, 245
- At common law *king* by attainder of treason not intitled to uses or trusts 247
- Trusts differ not from uses in substance 248
- Whether any other uses but trusts at making of 33 *H. 8.* 248, 249
- Why trusts kept from being executed by 27 *H. 8.* 248
- Wherein held and used as different from uses *ib*
- Whether trust of a freehold forfeited by attainder of treason 248, 249
- King* made a lease for years to one for provision of wines for the *king* in trust for another, who was afterwards attainted of felony, held *king* should have the trust 248
- So if one outlawed have a bond made to another in trust, it shall be executed by information in *exchequer* or *chancery* *ib*
- Vol. II.
- By attainder of *cestuy que trust* in fee-simple, neither land nor trust comes to the *king* or lord by escheat Page 249
- Escheat only *ob defectum tenentis* *ib*
- Attainder of felony not within 33 *H. 8.* *ib*
- Difference between a term in gross in trust for party attain, and trust of a term to attend inheritances, *quoad* forfeiture for felony 250, 251
- King* intitled to a term for years in gross, not in point of *escheat* by his prerogative, but as having *bona & catalla felonum* *ib*
- At common law, *king* by attainder of treason, not intitled to any chattels, which party had *ex autre droit*, as executor, &c. or in right of a corporation aggregate 251
- Baron possessed of a term in right of the *feme* forfeits it by attainder of treason, &c. *ib*
- But as to lands of inheritance, whereof he is seised in her right, if he be attainted of treason, *king* hath the freehold during the coverture *ib*
- So if tenant for life be attainted of treason, *king* hath freehold during life of party attainted; and so he had before 26 *H. 8.* by attainder of tenant in tail 251, 252
- At common law, and now, in case of a corporation aggregate, nothing was, or is forfeited by attainder of the head of the corporation 252
- At common law, a sole corporation, as abbot, &c. by attainder of treason forfeited to the *king* the profits of their abbey, &c. during their incumbency; but their successors not bound by such forfeiture *ib*
- But by 26 & 33 *H. 8.* these sole corporations forfeited the inheritance, and their successors were bound by such attainders *ib*
- But 5 & 6 *E. 6.* restores the right of successors 253
- E e By

A TABLE OF THE PRINCIPAL MATTERS

- By common law, all hereditaments, whether in tenure, or not, as rents, &c. are forfeited to the *king* by attainder of treason; but inheritances purely in privity, appropriate to the person, are not forfeited either by common law or statute, as a foundership, &c. *Page* 253
- At common law by husband's attainder of treason or felony, wife lost her dower; but *contra* by 1 *E.* 6. *ib*
- By 5 & 6 *E.* 6. husband attainder of treason, wife shall lose her dower; and it stands so now, save in treasons made by particular *acts*, where dower is saved, as, &c. *ib*
- Tho these are called royal escheats, the *king* hath these forfeitures *in jure coronæ*, of whomsoever the lands be immediately held *ib*
- A manor is held of the *king*, as of his honour of *D.* and manor escheats for felony of tenant, it is now parcel of the honour; and if *king* grant it out again generally, it shall be held of the honour; but if it escheat for treason, it is no parcel of the honour; and if granted out generally, it shall be held *in capite* 254
- Where land comes to the crown by attainder of treason, all mesne tenures of common persons are extinct; but if *king* grant it out, he is *de jure* to revive the former tenure, for which petition of right lies *ib*
- If tenant in tail of the gift of the *king*, the reversion in the *king* make a lease for years, and then is attainted of treason, the *king* shall avoid that lease, tho tenant in tail have issue living; yet if he after such lease had bargained and sold, or levied a fine to the *king*, the *king* should be bound by such lease, as long as there is issue *ib*
- At common law divers lords had by special grant, or in right of their counties palatine, royal escheats of the lands held within their franchises of persons attainted of treason, and several instances thereof *Page* 254, 255, 256
- In what treasons or not they shall have such royal escheats 256, 257, 258
- 26 *H.* 8. in force as to forfeitures for treasons within 25 *E.* 3. 257
- There is a proviso in 5 *Eliz.* whereby clipping is made treason, to save or confirm the rights of persons intitled to such royal escheats on attainders of treason within this *act* *ib*
- No like clause in any other *act* of new treason *ib*
- He, who hath *jura regalia*, shall not have forfeitures of tenant in tail for treason *ib*
- Royal escheats by prescription extend not to new treasons 256, 271
- Of the forfeiture of lands in a county palatine by attainder of treason out of a county palatine, or *é converso* 286
- Antiently, if one had been slain in open war against the *king*, the *king* did *de facto* take a forfeiture, and how, and where taken 342
- But in all other cases, whether of felony or treason, if party died before attainder, or after conviction, and before judgment, there ensued neither attainder nor forfeiture of lands 343
- If a traitor or felon rescue himself, or will not submit to be arrested, and on resistance is slain, on presentment thereof he shall forfeit his goods and chattels; but whether presentment traversable; *per assens.* he shall forfeit the issue of his lands for a year and day 343, 363, 489, to 492, 602
- One arraigned for felony or treason,

CONTAINED IN THE TWO PARTS.

- son, tho he be acquitted, yet if it be found he fled, forfeits his goods Page 343
- How far in treason attainder after party's death ousted by statute 343, 344
- One attainr of piracy before commissioners of *oyer and terminer* on 28 H. 8. according to course of common law forfeits lands and goods; but it works no corruption of blood 354
- If husband seised *in jure uxoris* hath issue by her, and then she commits treason, and is attainr and dies, husband shall be tenant by courtesy; *contra*, if treason committed by her before issue had 359
- Tenant in tail is attainr of treason; *king* on office found hath the freehold during life of tenant in tail 359, 360
- Attainder of treason, or felony of a copyhold gives the *king* no forfeiture; but it regularly belongs to the lord, if not a contrary custom 360
- By custom of *Kent* lands of one attainr of felony descend to the heir; *contra* of treason; but the lands of one attainr of felony by outlawry, or one abjuring, escheat ib.
- In petit treason and felony lands escheat to the lord; but *king* shall have *diem, annum & vastum* ib.
- How to be computed ib.
- Tenant in tail, or for life, or husband seised in right of his wife is attainr of felony, *king* shall have the *year, day and waste* against wife, issue and reversioner ib.
- Forfeiture for treason or felony to avoid *mesne* incumbrances relates to time of offense committed ib.
- Two joint tenants in fee; one is attainr of treason, and dies; land survives to the other, but subject to the title of forfeiture 360, 361
- If one be outlawed on indictment of felony or treason, and pending the process alien the land, yet *king* or lord shall have the land, which he held at time of felony committed; attainder by outlawry relates to day and year in indictment Page 361
- In appeal of felony or murder by writ, if pending it party aliens, and then is outlawed before appearance, lord's escheat is lost, because it relates only to the time of outlawry pronounced, the writ containing no certain time of offense committed ib.
- But *contra*, if defendant had appeared, and plaintiff had declared on his writ, and defendant had been convicted and attainr; or if appeal had been by bill, and thereon party had been outlawed, tho before appearance, escheat had related to time of fact committed to avoid *mesne* incumbrances 362
- Goods of persons convicted of treason or felony, or put in *exigent* for the same, or who fled, or stand mute, forfeit to the *king* ib.
- To what times respectively these forfeitures relate ib.
- Alienation made [of goods] *bona fide* by felon, or traitor, or one that flies, *mesne* between offense, or flight and conviction, or presentment of flight is good, and binds the *king*, if fraudulent, it is void by 13 *Eliz.* 362, 367
- If a felon be killed in flight, and it be found by inquisition, forfeiture of his goods relates to the flight 362
- If party comes not in, his goods forfeit on award of *exigent* 365
- In murder, title of lord by escheat to avoid *mesne* incumbrances relates to stroke given 426, 591
ii. 179
- In homicide *per infortunium*, party forfeits his goods, tho intitled, *quasi de jure*, to a pardon on course 477, 478, 492
- Officer killing felon in flight, or that

A TABLE OF THE PRINCIPAL MATTERS

- that resists, forfeits nothing
Page 481, 493, 494
- If the killing cannot be attributed to any *act* of the person killing, but of the deceased, the former forfeits not his goods, *quære*
 492, 493
- Where one killing another in his own defense forfeits his goods, or not
 493, 494
- Forfeiture for flight distinct from that for the felony
 ib
- In petit larciny party forfeits his goods, and so if acquitted, and it be found he fled
 530
- In appeal of felony or robbery, if appellant omit any of the goods stolen in his appeal, they are forfeit; and so in the case of a false appeal of robbery, where appellee came to the goods by bailment, or finding
 538
- If it be found *super visum corporis*, that felon fled, and was killed in flight, this presentment, tho after party's death, is conclusive as to the forfeiture for the flight
 ii. 154
- By judgment of *peine fort & dure* party forfeits his goods; but it is no attainder, nor gives any escheat, nor works corruption of blood
 ii. 319
- A convict within clergy forfeits all his goods, tho he be burnt in the hand: yet thereby becomes capable of purchasing and retaining other goods
 ii. 388, 389
- On burning in the hand, he ought to be immediately restored to possession of his lands.
 ii. 389
- Where alienage may falsify attainder in point of offense, as well as time or not. Vide *Falsifying Attainder*.
- For forfeiture by *felo de se*, and how it relates. Vide *Deodand, Felo de se*.
- Vide *Corruption and Restitution of Blood*.
- Forgery.**
- Exposition on 5 *Eliz.* making it felony without clergy, after former conviction
 683 to 687
- Former conviction to be conviction by judgment *Page* 384, 682, 683, 685, 686
- Offense in any forgery or publication within this *act* after former conviction, felony
 686
- A convict of publishing a false deed forges a deed, it is felony within the *act*; so *à converso* ib.
- How indictment for second offense to be
 ib
- On evidence, record of first conviction to be proved, yet the matter of it not be re-examined
 ib
- Where antedating a deed to avoid a man's own feoffment is forgery; intent herein considerable
 683
- What a making forging, or assenting to a forgery
 683 to 686
- Assent after makes not a principal, for that end it must be precedent or concomitant
 684
- Making a false customary, forgery
 ib
- Where inserting a clause in a will without direction of divisor is forgery, or not
 ib
- Forging surrenders, admittances, or court-rolls, within this *act*
 ib
- Forging deed or will, purporting a lease, or rent-charge for years is within it; so is forging assignment of lease for years, but not of lands in *Ireland*
 ib
- Where one publishes a deed, which he has been told to be false, is punishable within this *act*
 685
- Forging a will of goods within it
 ib
- What statutes or recognizances within it, or not
 ib
- Justices of assise, or oyer and terminer have expressly cognizance of offenses against this *act*; it extends to *B. R.* but not to justices of peace
 686
- Franchise.**
- He, who hath franchise of *infang-thief*, gives judgment of death against

CONTAINED IN THE TWO PARTS.

against a felon not within his jurisdiction, it is cause of seizure of liberty, but not murder

Page 498

Larciny cannot be committed of *treasure trove*, or wreck till seized; tho he, that hath them in point of franchise, may have a special action against him that takes them 510

Bailiff of franchise having a gaol and custody of a felon is chargeable for his escape, and not the sheriff 595

Franchises to be quit *de murther, latrocinio & escapiis* explained 604

Bailiff of franchise cannot execute process within his franchise, but by sheriffs mandate ii. 68

For franchises of coinage. Vide *Coin.*

Vide *County Palatine, Forfeiture.*

Frank-pledge.

Formerly all under twelve ought to have been in frank-pledge, save clergymen, noblemen, and knights, and their families

ii. 74

A most excellent constitution

ii. 75

Vide *Amercements.*

Fresh Suit and Pursuit.

Of restitution on appeals on fresh suit 539, 540, 541

How fresh suit to be inquired 540, 541

Fugam fecit. Vide *Coroner, Forfeiture, Inquest of Office.*

Gaol, Gaoler, and Prisoner.

IMPRISONING one so strictly, that he dies, murder; therefore, where any one dies in gaol, co-

roner to be sent for to inquire of his death Page 432

Clerk of crown to view body of one dying in king's bench prison ii. 58

If *mittimus* be not in writing and sealed, gaoler liable to false imprisonment; but not, if party committed by a court of record 583, 584

If commitment express no cause, gaoler in false imprisonment may aver that it was for felony 584

But he is not bound to receive felon on such *mittimus* 595

Commitment by a justice ought to be to common gaol; but if offense committed, and party taken within a franchise, then by statute to gaol there 585 ii. 123

Sometimes justices send prisoners, not having their bail ready, to some private prison, as *New Prison, &c.* till they can find bail; but this disliked by the judges. ib

Sheriffs and gaolers bound to receive felons, whether committed by justices, or attached *ex officio* by constables or private men 585, 594 to 597

By statute gaols of counties rejoined to counties 598

Where gaolers may put prisoners in irons to prevent their escape 601

Felony in gaoler by duress of imprisonment to make a man become approver against his will 640, 641

Tower, an exempt prison from that of the sheriff ii. 410

Charges of sending criminals to gaol by common law to be born by vill where taken; but by statute by prisoner, if able; if not, how levied ii. 96

Vide *Arrest, Breach of Prison, Commitment, Escape, Rescue.*

A TABLE OF THE PRINCIPAL MATTERS.

Gaol-delivery.

- Justices may assign a coroner to an approver ii. Page 31
- Must send their records determined into the exchequer ii. 31, 36
- The direction and tenor of their commission ii. 32
- By 8 R. 2. no *man of law* shall be justice in his own county ib
- How expounded by 33 H. 8. as to the county; this prohibition usually dispensed with by a *non obstante* ib.
- By charter mayor of London of the *quorum*, and so in *Norwich* ib
- May proceed against prisoners, (if in gaol) on inquisition before coroner, or any other justices ib
- Justices of peace must send to them their indictments not determined, whether of felonies or trespasses ib.
- The import of their precept to the sheriff; in whose name, and under whose *teste* it is to be ii. 32, 33, 261
- What to be done on return of precept ii. 33
- May take indictment, try and give judgment same day ii. 29, 34
- May command sheriff *ore tenus* to return a pannel ii. 34
- They may deliver by proclamation persons imprisoned, where no indictment preferred, or indictment preferred, and *ignoramus* found, which *per ascuns*, cannot be done by justices of *oyer* and *terminer*, or peace ib
- May originally take indictments of felony of prisoners in gaol ib
- Where felon is at large, by which of their powers in their commission they may take indictment ib
- Justices of *oyer* and *terminer*, gaol-delivery, and of the peace may make up their records by all three of their powers; and if good by any one commission, it is sufficient, and best shall be taken for the *king* ib
- Prisoner let to bail in law is in prison, and therefore justices of gaol-delivery may take indictment against him; but one let to mainprise, not in custody ii. Page 35
- They may deliver gaol of persons committed for treason ib
- Others may be added, or their power contracted, by *association*, or *si non omnes* ii. 23
- Subsequent justices have power by statute to give judgment on one reprieved after conviction ii. 35
- May award execution on judgment given by former justices ib
- If one be indicted and outlawed for felony before justices of peace, yet if he be in prison, by common law justices of gaol-delivery may award execution on that outlawry ib
- New justices by 1 E. 6. may proceed in every behalf, as if the old commissions or commissioners had continued not altered ii. 35, 405
- Justices may receive appeals by bill against any one in gaol ib
- May assign coroner to an appeal, and make process against appellee in a foreign county ii. 36
- Sheriff is to deliver to them names of all persons in gaol or bailed ib
- If an *aet* limit specially an offense to be heard and determined by justices of peace; *quære*, whether justices of gaol-delivery, or *oyer* and *terminer* may hear and determine it ib
- But where *aet* speaks only of justices in the county, it may be tried either before justices of *oyer* and *terminer*, or gaol-delivery ib
- By statute they have power to reform pannel *ore tenus*, either of grand or petit jury ii. 36, 156*, 265
- Clerks of the crown, &c. are to certify into B. R. names of all persons outlawed, attain, or convict,

CONTAINED IN THE TWO PARTS.

- convict, and such names shall be certified to justices of gaol-delivery ii. Page 36, 37
- Justices of gaol-delivery may send prisoners by *habeas corpus* to sheriff of another county, with a precept for him to receive them, viz. for a felony committed in that county, tho it be out of their circuit ii. 37
- Of necessity justices of gaol-delivery have in some cases power out of the precincts of their county or circuit ib
- Whether they can issue process of outlawry ii. 37, 199
- A.* and *B.* are indicted before justices of peace, and by 4 E. 3. indictment is delivered over to justices of gaol-delivery, *A.* appears, is tried and acquitted, *B.* appears not, the justices of peace cannot make out process against *B.* because record not before them; nor can justices of gaol-delivery make out process to outlawry returnable before the justices of peace ii. 37
- Neither can they proceed to outlawry before themselves, as justices of *oyer* and *terminer*, where indictment taken before justices of peace, but the intire record must be removed into *B. R.* by *certiorari*, and from thence process of outlawry issue ii. 37, 38
- By 26 H. 8. what crimes committed in *Wales*, justices of peace and gaol-delivery in counties adjacent to *Wales* have power to hear and determine ii. 38
- Repealed, as to treason, by 1 & 2 P. & M. but in force as to other felonies ib
- They are by statute to hold their sessions, where county-court held but statute only directive 239
- They may, after prisoner has pleaded, take his pannel from sheriff without making any precept to him ii. 261
- Where commission special, they do not send out a general precept to the sheriff to return juries against they come ib
- New justices may award execution on a party reprieved after judgment Page 405
- But not fit to give judgment, or award execution on one reprieved by another judge, without knowing on what grounds the reprieve was ii. 406
- Precepts, as *venire fac.* &c. by them, need not be otherwise than by award on the roll ii. 410
- For jury-process issued by justices of gaol-delivery. Vide Trial.
- Power of making justices of gaol-delivery in counties palatine, and franchises resumed. Vide County Palatine.
- Vide Commission, Court, Justices of Assize, Justices of Peace, King's Bench, Oyer and Terminer, Process.
- Goods. Vide Forfeiture, Restitution, Seizure.
- Grand Larciny. Vide Larciny.
- Grand Jury. Vide Jury.
- Grant.
- Grant of judicial, or ministerial offices, concerning administration of justice, during king's pleasure, is determined by his death 706
- Grant of a judicial office, *quam diu se bene gesserit*, tho a freehold, is determined by his death ib
- But grants of offices of a different kind, or of lands *durante beneplacito*, are not determined without some act or declaration by the successor ib
- Forfeiture of goods for treason, same as forfeiture for felony; but a difference in grants thereof 239
- A manor held of the king, as of his honour of *D.* escheats for felony of tenant, it is now parcel E e 4 of

A TABLE OF THE PRINCIPAL MATTERS

of the honour; but if it escheat for treason, it is no parcel of the honour; and if granted out generally, shall be held *in capite*
Page 254

Habeas Corpus.

WHERE temporal judge might have taken notice incidently, whether a tenet was heresy or not, and *nient obstante* return of diocesan, have delivered party imprisoned on this writ 400, 407, 408
 Cause necessary to be expressed in commitment, in order to be returned on *habeas corpus* 584
 It is *quasi* a writ of right, or error to determine, whether imprisonment good or erroneous *ib*
 Where justices of gaol-delivery may send prisoners by this writ to sheriff of another county out of their circuit *ii. 37*
 Of writ of *habeas corpus ad subjiciendum*, and bailing thereon *ii. 143 to 148*
 What to be done on return being filed *ii. 143*
 Party to be remanded till return filed *ii. 146*
 Whence it issues *ii. 143, 144*
 When it issues out of *C. B.* or *Exchequer*, it is where party is privileged, or to charge him with an action *ii. 144, 312, 313*
 If one be sued in *C. B.* or is supposed to be so sued, and is arrested for a pre-supposed misdemeanor, or for felony, this writ lies there; and if it appears on return, that party is wrongfully committed, the privilege shall be allowed, and party discharged; or if doubtful, bailed to appear in *B. R.* *ii. 144*
 If one be sued in *C. B.* and is arrested and imprisoned for felony &c. tho gaoler on *habeas corpus* ought to return the causes, as well criminal, as that where-with he is charged out of that court, yet *C. B.* ought not to

commit to the *Fleet*, nor discharge him, nor take bail to answer there, but may bail on the action, and remand him to sheriff as to the crime *Page 144*
C. B. have now by *statute* original jurisdiction to bail, discharge, or commit on this writ one committed by council-table, as well as *B. R.* and that tho party hath no privilege *ii. 144, 145*
B. R. and *Chancery* have an original jurisdiction to grant this writ and bail, &c. tho no privilege returned *ii. 145, 147*
 Of *habeas corpus ad faciendum & recipiendum* granted by *B. R.* when granted, and before whom returnable *ib*
 If a civil action and matter of crime be returned, and action appear to be fraudulent, party may be remanded; if real, court may commit him to the marshal with his causes, tho they are matters of crime *ib*
 On writ *ad faciendum*, &c. not singly a matter of crime ought to be returned, for that belongs to writ *ad subjiciendum* *ib*
 When *habeas corpus* in criminal causes issues out of chancery, and cause is returned, chancellor may judge thereof, and may discharge or bail prisoner to appear in *B. R.* or may *propritis manibus* deliver record in *B. R.* and thereon *B. R.* may proceed to bail, &c. *ii. 147*
 But if chancellor discharge him not, but bail him, surety must be to appear in *B. R.* or if chancellor will do neither, he may commit him to *Fleet* till term, and then he may be turned over to *B. R.* and there proceeded against; chancellor hath no power to proceed in criminal causes *ib*
Habeas corpus (before 31 *Car. 2.*) in criminal causes should regularly have issued out of chancery in vacation, and *B. R.* in term *ib*

Sending

CONTAINED IN THE TWO PARTS.

Sending *habeas corpus ad faciendum & recipiendum* by chancellor for persons arrested in civil causes not warranted by law, and as to persons in execution, forbidden by statute ii. Page 148

Habeas corpus removes body, *certiorari* record ii. 210, 211

Court cannot on bare return of *habeas corpus* give any judgment, or proceed on record of indictment, unless removed by *certiorari*; but it stands in same force it did, tho return be adjudged ill, and party be discharged; and court below may issue new process on indictment, tho *contra* on *habeas corpus* in civil causes, for therein it is a *superfedeas* ii. 210, 211

By whom *habeas corpus* to be signed ii. 211

For other matters. Vide *Certiorari*.

Hawks. Vide Felony by Statute, Larceny.

Heresy. Vide Religion.

Homage. Vide Allegiance.

Homicide.

The several kinds of homicide

424

Homicide defined 425

Involuntary homicide defined 471

In this case, indictment must find special matter, or if indictment be of murder or manslaughter, and on trial it appear to be involuntary, how jury to find ib

Prisoner in such case must plead *not guilty* 471, 478

Division of involuntary homicide 471

Homicide *per infortunium* defined and exemplified 472

If one shoot at butts, and by casualty his hand shakes, and arrow kills a by-stander *per infortunium* ib

So if a carpenter or mason in building casually let fall a piece of timber, &c. and kills another Page 472, 475

But if he voluntarily let it fall without giving due warning, whereby it kills another, it will be at least manslaughter, *quia debitam diligentiam non adhibuit* ib

So if one be felling a tree in his own ground, and it fall and kill another, chance-medley ib

Tho chance excuseth from felony, it excuseth not from trespass ib

If two play at barriers, or run a tilt by king's command, and one kill the other, it is *per infortunium*; but without it, manslaughter 473

If a school-master correct his scholar, &c. who by struggling, or otherwise dies, only *per infortunium* 474

But if correction be with a lethal instrument, or outrageous, it is murder ib

Several come to enter the house of A. as trespassers, A. shoots and kills one, manslaughter; *contra* if they had entered to commit a felony ib

Where, on an alarm that thieves were breaking into the house in the night, the master killed a servant hid in a buttery thro' fear of being discovered by them, (the servant being mistaken for one of the thieves, and not discerned in the dark) it was held no felony; *quare*, whether homicide *per infortunium* ib

If one knowing that people are passing along the street throw a stone, or shoot an arrow over the house or wall, with intent to do hurt, and one is thereby slain, this is murder; and if without such intent manslaughter, and not *per infortunium*, because *act* unlawful 475

One, in shooting at a deer in his own park, by accident kills another

A TABLE OF THE PRINCIPAL MATTERS

- other man, homicide *per infortunium*, but *contra*, if it be in the park of a stranger without his licence, then it is manslaughter Page 475
- A.* throws a stone at a bird, and thereby kills a man, to whom no harm intended, *per infortunium* ib
- But if he had thrown it to kill the poultry, or cattle of *B.* and the like accident had happened, it had been manslaughter, but not murder; because not with intent to hurt the by-stander ib
- An *act* prohibits shooting in a gun without such a qualification, and under a penalty; one unqualified shoots with a gun at a bird, and it kills a by-stander by some accident, that in another case would have amounted only to chance-medley; this no more than chance-medley in him, keeping a gun in such case, being only *malum prohibitum* 475, 476
- A servant set by his master to watch in the night in a corn-field with a gun charged, and ordered by him to shoot when he heard any bustle in the corn by deer; master himself improvidently rushes into the corn, servant supposing it to be deer, shoots and kills his master, only chance-medley, because servant misguided by his orders 476
- But if master had not given such orders, it would have been manslaughter, because he did not *adhibere debitam diligentiam* to discover his mark ib
- A.* drives his cart carelessly, and it runs over a child in the street, if *A.* having seen the child, yet drives on upon him, it is murder; but if he saw not the child, manslaughter; but if child had run cross the way, and cart run over it before it was possible for carter to stop, it is *per infortunium* ib
- If one riding in the street whip his horse to put him into speed, and run over a child and kill him, homicide, and not *per infortunium*; and if he had rid so in a press of people with intent to do hurt, and horse had killed another, it had been murder Page 475
- But if one be riding in the street, a by-stander whips the horse, whereby he runs away against will of rider, and runs over and kills a man, it is chance-medley only, in which case jury are to find the special matter; yet where coroner's inquest finding special matter stands untraversed, court will receive verdict of *not guilty* on indictment by grand inquest, and party confessing indictment by coroner, shall have his pardon of course 476, 477
- Killing another *per infortunium*, not in truth felony, how verdict concludes; party forfeits his goods, and why; tho he ought to have *quasi de jure* a pardon of course, yet he is not to be discharged, but bailed till next term or sessions to sue out such pardon 477
- Homicide *ex necessitate*, partly voluntary, partly involuntary 478
- Necessity of two kinds: 1. Of a private nature. 2. That which relates to public justice and safety ib
- Former obliges one to his own defense and safe-guard, and what inquiries this takes in ib
- Two kinds of homicide *se defendendo*, and respective consequences thereof ib
- Homicide *se defendendo* defined 479
- What circumstances therein observable 479 to 484
- There being malice between *A.* and *B.* they appoint time and place to fight, and meet, *A.* gives first onset, *B.* retreats as far as he can with safety, and then kills *A.* who had otherwise killed him, murder; because they met by compact 479
- There

CONTAINED IN THE TWO PARTS.

There being malice between *A.* and *B.* they meet casually; *A.* assaults *B.* and drives him to the wall; *B.* in his own defense kills *A.* this *se defendendo*

Page 479

A. assaults *B.* and *B.* presently thereon strikes *A.* without flight, whereof *A.* dies, this is manslaughter; but if *B.* strike *A.* again, but not mortally, and blows pass between them, and at length *B.* retires to the wall, and being pressed on by *A.* gives him a mortal wound whereof *A.* dies, only *se defendendo*

ib

A. by malice makes a sudden assault on *B.* who strikes again, and bearing hard on *A.* *A.* retreats to the wall, and in saving himself kills *B.* whether murder, or *se defendendo*; what fact the question depends on

479, 480

In homicide *se defendendo*, some act to be done by party killing, for if he be merely passive, only *per infortunium*

480

A. assaults *B.* who flies to the wall, or falls holding his sword, &c. in his hand, *A.* runs violently, or falls on knife, &c. of *B.* without any stroke or thrust offered by *B.* and dies, *per infortunium*; *quære*, whether *A.* *felo de se*

480, 481

He, who kills in his own defense, ought to fly, as far as he may, to avoid violence of assault, before he turn on assailant

481,

483, 486

Argument against duelling

ib

If gaoler be assaulted by prisoner, or sheriff, or bailiff in execution of his office, he is not bound to give back to the wall; but if he kill assailant without such retreat, only *se defendendo*

ib

The like of a constable, or watchman

481

But if prisoner resists not, but flies, yet officer for fear of rescue

gives prisoner a mortal stroke, it is murder; for here was no assault first made by prisoner, and so cannot be *se defendendo* in officer

Page 481

Difference between civil actions and felonies

ib

If one be in danger of arrest by *cap.* in debt, &c. and he flies, and bailiff kills him, murder

ib

But if felon flies, and cannot be otherwise taken, if he be killed, justifiable, and officer forfeits nothing; but person killed forfeits his goods

ib

A thief assaults a true man, either abroad, or in his own house, to rob or kill him, true man not bound to give back, but may justify killing assailant, and it is no felony

ib

If *A.* assault *B.* so fiercely, that *B.* cannot save his life, if he give back, or if *B.* fall to the ground, whereby he cannot fly, if *B.* kills *A.* it is *se defendendo*

482

Where first assailer may be said to kill the assailed *se defendendo*, or not

482 to 484

If *A.* assault *B.* and *B.* thereon re-assault *A.* and *A.* flies to avoid the assault of *B.* who pursues him, and then *A.* being driven to the wall turns again, and kills *B.* whether *se defendendo*

482

But if *A.* assaults *B.* first, and *B.* re-assaults *A.* so fiercely, that *A.* cannot retreat to the wall, or other *non ultra*, without danger of his life, nay, tho *A.* fall on the ground on the assault of *B.* and then kills *B.* murder or manslaughter

ib

Where one is assaulted so fiercely, that he cannot fly, law will interpret this necessity to a flight to give him the advantage of *se defendendo*: but *contra*, where first assailant is re-assaulted so vigorously that he cannot fly, law will not let him take advantage of this necessity, the consequence of his own wrong

ib

Where

A TABLE OF THE PRINCIPAL MATTERS

Where *A.* the first assailant flies, and the affray is interrupted, and *B.* the first assaulted pursues *A.* to kill him, and *A.* after his flight, on necessity of saving his life, kills *B.* it is but *se defendendo*; but when done altogether, without any interval of flight or parting, and *B.* gains the present advantage by his address or courage to preclude flight of *A.* and then *A.* kills him, manslaughter Page 483

Flight to gain advantage of *se defendendo* to party killing must not be feigned, or to gain advantage of breath, &c. it must be from the danger, as far as party can, either by reason of some wall or other *non ultra*, or as fierceness of assailant will permit ib

Whether party killing was guilty of first breach of peace, considerable in these cases ib

What offense, if one kill another in the necessary saving of the life of a man assaulted by party slain 484

A. assaults the master, who flies as far as he can to avoid death, servant kills *A.* in defence of his master, it is homicide *defendendo the master*, and servant shall have his pardon on course: so where master kills in necessary defence of servant ib

Like law, where husband kills in defence of wife, parent of child, and *é converso* ib

How far relation of acquaintance, and mutual society will excuse one companion killing in necessary safe-guard of life of another ib

Killing one attempting to rob or kill another in case of necessity puts him in condition of *se defendendo* his neighbour 484, 485

A woman kills a man assaulting to ravish her in the attempt, *se defendendo* 485

So it is, if husband or father kill him in the attempt, if it could

not be otherwise prevented; but if it might, it is manslaughter

Page 485, 486

What the offense in killing him, that takes the goods, or doth an injury to the house or possession of another, herein many differences, as between a trespassable and felonious *act*, and felonious *acts* themselves 485

to 489

If *A.* pretending title to the goods of *B.* take them away from *B.* as a trespasser, *B.* may justify beating *A.* but if he beat him, so that he dies, it is manslaughter 485, 486

A. is in possession of *B.*'s house, *B.* endeavours to enter on him, *A.* can neither justify assault, nor beating of *B.* because *B.* had right of entry; but if *A.* be in possession of a house, and *B.* as trespasser enters on him, *A.* may *molliter manus imponere* to put him out, and if *B.* resist, and assault *A.* then *A.* may justify beating him *de son assault demesne* 485

But if *A.* kill him in defence of his house, it is manslaughter 485, 486, 487

A. being in possession of a house by title, *B.* endeavoured to enter, and shot an arrow at them within, and *A.* from within shot an arrow at those that would have entered, and killed one of them; not *se defendendo*, but manslaughter, because no danger of *A.*'s life from them without 485, 486

If *B.* had entered into the house, and *A.* had gently laid his hands on him to turn him out, and then *B.* had turned on him and assaulted him, and *A.* had killed him, so if *B.* had entered on him and assaulted him first, and *A.* had killed him, it had been only *se defendendo*, the entry of *B.* was not to murder, but as a trespasser to gain possession 486

A. in such case being in his own house

CONTAINED IN THE TWO PARTS.

- house need not fly as far as he can Page 486
- Husband kills adulterer in the *act*, manslaughter ib
- Difference between killing a man attempting an *act*, which is felony or otherwise, as to making it *se defendendo*, &c. ib
- If one come to rob me, and take my goods as a felon, and I kill him, it is *me defendendo* at least, and in some cases justifiable ib
- At common law, if a thief had assaulted a man to rob him, and he had killed him in the assault, it had been *se defendendo*; but *quære*, whether he had forfeited his goods 487
- One attempting a burglary with intent to steal, or kill, or attempting to burn the house of another, if owner of the house, or any within had shot and killed the person so attempting, this had been no felony or forfeiture ib
- By 24 H. 8. killing any one attempting any robbery or murder in or near the highway, &c. or in a mansion-house, or attempting to break a mansion-house in the night by any person, &c. he who kills (tho a lodger or servant) shall be absolutely acquitted and discharged of the death of such person ib
- There being malice between A. and B. and having fought often, and afterwards meeting suddenly in the street, A. said he would fight him, B. declined it, and fled to the wall, and called others to witness it, and A. pursued and struck him first, and B. in his own defense killed him, he was acquit from any forfeiture by this *act* 487, 488
- Trespases in houses, or in or near highways, are left as before this *act* 488
- It doth not indemnify killing a felon, where felony not accompanied with force as killing one attempting to pick a pocket ib
- What breaking of a house in the day this *act* extends to, or not Page 488
- One attempting wilful burning of a house is killed in the attempt, the killer is free from forfeiture without aid of this *act* ib
- If any felon, after felony committed, resist those that attempt to take him, or fly and be killed, this killing no felony; but this *act* relates not to it ib
- If a felon before arrest resists and flies, or after arrest escapes and flies, and the officer, not being able to take him without killing, kills him, officer shall be found *not guilty*; but if he could have been taken without killing, it is manslaughter at least in the officer, and jury is to inquire, whether done of necessity or not 489, 490
- So where private man without warrant, of necessity kills a felon resisting and flying before arrest, or after arrest escaping and flying, tho felon not indicted, it is justifiable, for in such case, law makes every one an officer to take a felon 587, 588
- ii. 77, 78, 82
- A felon is taken, and in bringing to gaol escapes, villagers pursue and of necessity kill him, they shall be acquitted 489, 490
- A felony done, but not by A. and B. hath a warrant, or *hue and cry* comes to B. as constable to take A. A. attempts an escape, or resists, B. kills him of necessity, tho A. be not indicted, justifiable 490
- In all cases of homicide by necessity matter may be specially presented by grand or coroner's inquest, and thereon party may be presently discharged without being put to plead, but may be indicted again, if former indictment false; *contra*, where indictment simply of murder or manslaughter 491, 492. ii. 158
- Ex-

A TABLE OF THE PRINCIPAL MATTERS

- Exposition on 21 E. 1. *de malefactoribus in parcis*** Page 491
- Cases, where prisoner is not to forfeit his goods, but be acquitted, re-capitulated** 493, 494
- A. shooting at rovers, if B. after arrow delivered of his own accord runs into the place, where it is to fall, and so is killed, A. forfeits nothing, *quære*** 492
- If coroner's inquest find specially *se defendendo*, party shall be arraigned and tried, whether it was in his own defence or not, before he shall have his pardon of course** 493
- A constable, who commands *king's* peace in an affray, is resisted, he need not give back to the wall, and if he kill those that resist, it is justifiable** 494
- Killing a rioter, who resists, by sheriff, justice of peace, or constable, or his assistants, no felony at common law, nor makes any forfeiture** 53, 294, 495, 496
- What authority *homicide in execution of justice* requires in the judge and officer, who executes the judgment** 497
- Where judge hath jurisdiction, tho he err, officer in executing judgment justified; *contra*, where judge hath no jurisdiction** 501
- If after or before arrest A. an innocent man suspected draws his sword and assaults B. the party suspecting, and B. presseth on him, either to take or detain him, and in conflict A. kills B. it is murder; but if B. kills A. justifiable** ii. 83
- If before or after arrest, bailiff on assault made on him kills the party, it is justifiable, neither is he bound to retreat** ii. 83, 118
- If persons pursued by peace-officers for felony, or breach of peace or just suspicion thereof, as night-walkers, &c. shall not yield themselves to these officers, but either resist or fly before taken, or being taken rescue themselves, and resist or fly, and are on necessity slain; no felony in officers or assistants, tho parties killed are innocent** ii. Page 85, 86
- By their resistance against authority of the *king* in his officers, they draw their own blood on themselves, and are accessaries to their own death** ii. 86, 118
- One charged with suspicion of felony on just grounds, and where a felony is actually done, tho he be innocent, yet if he resist officer after notice that he is such, and assault him, and officer kill him, no murder** ii. 92, 93
- If he fly, and cannot be otherwise taken, whether officer may kill him** 490. ii. 93
- One is dangerously wounded, and constable is killed on pursuit of offender, murder; but if he kills offender, justifiable** ii. 94
- A warrant issues against one for trespass, or breach of the peace, and he flies, and will not yield to arrest, or being taken escapes, and officer kills him, murder** ii. 117
- But if he either on attempt to arrest, or after arrest assault officer who hath the warrant, with intent to escape, and officer standing on his guard kills him, necessity excuseth him, and he is not bound to retreat** ii. 117, 118
- Where a warrant issues against a felon, or only as one suspect, and either before or after he flies and defends himself with stones, &c. so that officer kills him on necessity, no felony: and so where constable doth it *virtute officii*, or on pursuit of *hue and cry*** ii. 118
- But where warrant is against one suspect only, what cautions to be used** ii. 118, 119
- Private man may arrest a felon; if he kill him of necessity, he is ex-**

CONTAINED IN THE TWO PARTS.

excusable; but then it is at his peril that he be a felon; if not, at least manslaughter ii. Page 119
 In case of justifiable homicide, or that which is not felony, what coroner's inquest to find, and how indictment to be, and what proceedings to be had therein in order to discharge the prisoner ii. 303

In indictment or appeal of felony defendant cannot justify, but shall have advantage of it on general issue ii. 304

Felony committed by *B.* but *A.* that arrests him, knows it not, law same as if he knew it, only what he does is at his peril ii. 78

Vide Forfeiture, Indictment, Judgment, Murder and Manslaughter.

Homine replegiando. Vide Bail, House.

Where assembly to defend one's house justifiable; it is a man's castle of defence 445, 487, 547

If one be assaulted in his house by a trespasser attempting to gain possession, he need not fly as far as he can, for he hath the protection of his house to excuse him from flying 486

Where an assault, battery or homicide is excusable or justifiable, in defence of possession of a man's house, or not. Vide Homicide, Murder and Manslaughter.

Hue and Cry.

A good warrant to pursue and take criminals without warrant of justice of peace, and tho no constable be in pursuit; and killing any of the pursuants by malefactor, murder; all malefactors in same field principals in the murder 465

Constable and vill bound to pursue, or else fineable 588. ii. 99, 102

One present at commission of a felony bound to endeavour to take felon, or raise *hue* and *cry* Page 588. ii. 99, 102

It is the old common law process after felons, and such as have dangerously wounded another ii. 98

By *Westm.* 1. persons on *hue* and *cry* not pursuing felons, how punishable ib

By 4 *E.* 1. how and in what cases to be levied ib

Statute of *Winton* makes a further provision touching *hue* and *cry* ii. 98, 99

Levied and not pursued, an article inquisible in the *leet* ii. 99

Tho sometimes proper to have a justice of peace to direct his warrant for raising *hue* and *cry* yet not of necessity, or sometime convenient ii. 99, 100, 102

Pursuants in constable's assistance may plead the general issue on 7 & 21 *Jac.* therefore expedient constable be called to this action ii. 99, 100, 104

Yet may be raised by country in his absence, which is called *cry de pais* ii. 100

If raised, and no felony committed, or on an innocent man, how they that raised it are punishable ii. 102, 104

Where murder to kill pursuants, tho without warrant or constable 465. ii. 100

What party raising it is to do, and what duty of constable thereon ii. 100, 101

Pursuants on a supposed felony, not actually committed, may arrest and proceed, as if real felony done ii. 101, 102

There needs no averment that a felony was done in justification of imprisonment on *hue* and *cry* levied ii. 101, 102, 104

Yet it must be averred, that an information was given that the felony was done, it arrest be by that constable that first received the information, and so raised the

A TABLE OF THE PRINCIPAL MATTERS

- the *hue* and *cry*; or if arrest was made by that constable or those vills to whom *hue* and *cry* came at second hand, what must be averred ii. Page 104
- As *hue* and *cry* neither describes, nor names person of felon, but only felony done; and therefore arrest of person is left to discretion of constable, or people of second or third vill; he that arrests any one on such general *hue* and *cry* must aver that he suspected, and shew a reasonable cause of suspicion ib
- If one pursued on *hue* and *cry* be in a house, and doors shut, and refused to be opened, constable on demand, &c. may break open doors ii. 102
- Same law on dangerous wound given, and *hue* and *cry* levied on offender ib
- If offender cannot be otherwise taken may be killed ib
- Constable on *hue* and *cry* may search in suspected places within his vill, yet his entry must be *per ostia aperta*, for he cannot break open doors barely to search, unless party be there ii. 103
- It is a sort of process, whereby constable may arrest by description ib
- Pursuants to take such as they have probable cause to suspect ib
- Who are suspicious persons ib
- Where they that live and have land in the hundred are competent witnesses, or not, in action against hundred ii. 280, 281
- Husband and Wife. Vide Coverture.
- Idiot, Lunatick and Madman.
- R**EGULARLY no incapacities excuse the parties from damages to be recovered against them in a civil action for any act done by them; but *contra*, where proceedings are *ad pœnam* Page 16
- Ideocy*, *madness*, and *lunacy*, fall under the general name *dementia* 29
- Tho by law no man shall avoid his own act for these defects, tho his heir or executor may, yet as to capital offenses he hath the advantage thereof ib
- Idiot* described; *ideocy* or not, how tried ib
- Dementia accidentalis*, vel *adventitia*, from what causes it proceeds 30
- Distributed into a partial and total insanity ib
- Of partial insanity 30, 412
- It seems not to excuse party in doing any capital offense 30
- Most offenders under a degree of partial insanity, when they commit their offenses 30, 412
- Difficult to define indivisible line, that divides perfect and partial insanity 30
- It must rest on circumstances ib
- Caution against inhumanity towards defects of human nature, and *è contra*, against too great indulgence to great crimes ib
- What measure of understanding is sufficient not to excuse in capital offenses ib
- A total alienation of mind excuseth ib
- Accidental *dementia*, whether total or partial, distinguished into *phrenies* and *lunacy* 31
- The moon hath great influence in all diseases of the brain 30
- When such persons are in the height of their distemper ib
- One absolutely mad for a day, killing another in that distemper is equally *not guilty*, as if mad without intermission ib
- When lucid intervals ordinarily happen ib
- Crimes committed by lunaticks during their lucid intervals are subject to same punishment, as if they had no such defect ib
- Alien-

CONTAINED IN THE TWO PARTS.

- Alienations and contracts made during such intervals bind their heirs and executors *Page 30*
- Accidental *dementia*, whether temporary or permanent is, either *furor*, &c. or *delirium*, &c. *ib*
- The causes and effects of *furor*, &c. and so of *delirium*, &c. *ib*
- Dementia affectata*, or drunkenness regularly excuseth not, except in two cases, and what these are *32*
- Easy to counterfeit madness *ib*
- Degrees whereof various, some sufficient, some not, to excuse in capital offenses *32, 33*
- How madness with respect to offenders to be tried *33*
- Ideocy*, &c. how tried in order to the commitment or custody of person and estate *ib*
- King has an interest in an *ideot*, but in case of a *lunatick* it is only a trust in him *ib*
- Party sound *ideot*, &c. may be brought before chancellor or king for inspection *ib*
- All men of age of discretion supposed *sane*, unless contrary proved, and that as well in cases civil as criminal *ib*
- If one be a *lunatick*, and hath *lucida intervalla*, and this be proved, yet law presumes acts or offenses of such a person to be committed in those lucid intervals, unless contrary appears, and that as well in civils as criminals *34*
- In civil causes he, who alledges an *act* done in time of lunacy, must strictly prove it so; yet in criminals (where court is to be so far of counsel with prisoner, as to assist in matters of law, and true stating the fact), if a *lunatick* be indicted of a capital crime, and this appear, witnesses must be examined, whether prisoner under actual *lunacy* at time of offense done *ib*
- Surdus* and *mutus a nativitate* presumed an *ideot*, unless contrary appear; if so, he may be tried *Vol. II.*
- and executed, tho caution to be used herein *Page 34*
- If one, while *sane*, commit a capital offense, and before arraignment become absolutely mad, he ought not to be arraigned during such phrensy, but remitted to prison till he recover *34, 35*
- If such a man after his plea, and before trial, become of *non sane memory*, he shall not be tried; or if, after his trial, he become so, he shall not receive judgment; or if after judgment, his execution shall be spared and why *35*
- Proper to impanel a jury to inquire *ex officio* touching such insanity *ib*
- If a madman commit homicide during his insanity, and continue so till he comes to be arraigned, he shall neither be arraigned nor tried, but remitted to gaol, to remain in expectation of king's grace *ib*
- But fit in such case to swear a like inquest *ex officio* *ib*
- If one in a phrensy happen by some over-sight to plead to indictment, and is put on his trial, and it appears to the court that he is mad, judge in discretion may discharge jury of him, and remit him to gaol to be tried after his recovery; but if there be no colour of evidence to find him guilty, or there be pregnant evidence to prove his insanity at time of fact done, in favour of life and liberty, it is fit that the court proceed to trial in order to his acquittal and enlargement *35, 36*
- One during his insanity commits homicide or petit treason, and recovers his understanding, and being indicted or arraigned for same pleads *not guilty*, he ought to be acquitted, *quia non felleo animo* *36*
- No difference whether phrenzy permanent or temporary, provided

A TABLE OF THE PRINCIPAL MATTERS

vided fact be done, while party
under that distemper *Page* 36
Madman cannot act *per electionem*,
or *intentionem* 36, 37
Such insanity as excuseth in *homi-*
cide, excuseth in treason ib
Whether there be any exception
to this rule 37
Jury may find one *non compos* ei-
ther *not guilty*, or the matter
specially 28

Jeofails.

None of the statutes extend to in-
dictments, nor is a defective in-
dictment aided by verdict
ii. 193

Vide Amendment.

Jesuit. Vide Felony by Sta-
tute, Religion, Treason.

Ignorance.

Ignorance of law or penalty ex-
cuseth not one of age of discre-
tion, or *compos mentis* from pe-
nalty of the breach of it; but
in some cases *ignorantia facti*
excuseth 42

Ignorantia eorum, quæ quis scire
tenetur, non excusat ib

Where ignorance of the person ex-
cuseth in homicide ib

Jac. 1. issued several commissions
of gaol-delivery, &c. justices
went their circuit, *king* died,
yet they proceeded, tho in strict-
ness of law they were determin-
ed by *king's* demise, yet judges
were excused 499

Ignorantia juris in some cases ex-
cuseth a judge, much more *ig-*
norantia facti ib

Receipt of felon after attainder in
same county makes not person
accessary without notice 323

Every man within vill bound to
take notice of constable in the
day, tho not in night without
notice 461

Sufficient notice that a man is a
bailiff by saying *I arrest you*
Page 461

Justices of gaol-delivery not bound
to take extrajudicial notice of a
second commission, (nor of ru-
mours and reports) the like in
case of a sheriff 499

For cases of misfortune, and casu-
alty falling in with the case of
ignorance. Vide Homicide.

Impeachment.

Appeals of treason by particular
persons ousted by 1 *H.* 4. im-
peachments by the commons
frequent, because rather *quasi*
grand indictments than appeals
349. ii. 150*

It is a presentment by the most so-
lemn grand inquest in the realm
ii. 150*

Imprisonment. Vide Arrest,
Commitment, Justice of Peace.

Incapacities.

Divided and subdivided 15

Ordinarily no incapacity excuses
these persons, that are under
them, from civil actions; but
contra, where proceedings are
ad pœnam 16

In all cases of infancy, &c. if one
incapable to commit a felony be
indicted by grand inquest, and
thereon is arraigned, petit jury
may either find him generally *not*
guilty, or the matter specially 28

Vide Coverture, Idiot, Igno-
rance, Infant, King, Master
and Servant, Necessity, Pa-
rent and Child,

For casualty. Vide Homicide.

Indictment.

The specification of *high treason*
consists principally in this ag-
gravation, that it is *contra li-*
geantiam suæ debitum. 58

Proditorie

CONTAINED IN THE TWO PARTS.

- Preditorie* imports a breach of trust
owing to the *king* Page 59
- How indictment of treason shall
conclude ib
- Indictment of treason against *alien*
amy shall be laid to be *contra*
dominum suum, and not *natura-*
lem, &c. but shall conclude *con-*
tra ligeantiae suae debitum ib
- For compassing death of king, queen,
or prince, how treason and the
inducement to the overt-act to
be set forth 108
- The overt-act to be set forth in
pursuance of the treason alleged
108. ii. 187
- Several overt-acts may be laid,
and proof of any of them main-
tains indictment 122
- An actual rebellion or insurrection
must be exprest in indictment
by the name of *levying war* 144
- Indictment for counterfeiting king's
coin ought to shew particularly
what kind of coin, but, tho
usual to express the numbers,
unnecessary ii. 187
- For clipping or impairing coin,
&c. it must pursue the words of
5 & 18 *Eliz.* and conclude *con-*
tra formam statuti; and this not
only in case of clipping foreign
coin, but also the coin of *Eng-*
land 220
- Indictment must shew it was *lucri*
causa 328. ii. 190
- Indictment against receiver of a
traitor must be special of the re-
ceipt, and not generally that he
did the thing, which may be
otherwise in case of a procurer,
counsellor or consenter 238
- All treason is a misprision of trea-
son and more; and he who is
assisting to a treason, may be in-
dicted of misprision of treason
only 374
- How indictment of *murder* ought
to conclude, *Et sic*, &c. 427
ii. 187, 188
- In indictment of manslaughter on-
ly, if others be indicted as ac-
cessaries *before*, indictment is
void against them 437
- If *A.* be indicted of murder, and
B. as accessory *before* by pro-
curement, and *A.* is found guilty
of manslaughter only *B.* shall be
discharged Page 437
- How indictment to be against per-
sons present and assisting to a
murder ib
- Where *A.* came with *B.* to beat
C. and *B.* beat him till he died,
indictment antiently set forth
the matter specially, but now
it only runs that *A.* was present
aiding and assisting 440
- Indictment of murder requires these
words, *felonicè ex malitia sua*
præcogitata interfecit & murdra-
vit, of simple homicide only *fe-*
lonicè interfecit 450, 466
ii. 186, 187, 344
- Implied malice, or malice in law
maintains general indictment of
murder 460
- Where *homicide* is within 1 *Jac.* of
stabbing, usual to prefer two in-
dictments; one of murder, an-
other on the *act*, and put pri-
soner to plead to both, and to
charge jury first with indictment
of murder, and then with the
other on the *act*, because if con-
vict on either, clergy ousted
468. ii. 239, 240
- How indictment on this *act* to be
to oust clergy 468
- It need not conclude *contra formam*
stat. because it makes not the
offense, but ousts clergy ib
- Tho none ousted of clergy but he
who stabs, yet being formed on
the *act* is a good indictment of
manslaughter against those who
were present and assisting, and
thereon principal in first degree
may be convict of single man-
slaughter, and acquit of man-
slaughter on the *act* 468, 469.
- In case of involuntary homicide,
indictment may find the special
matter 471
- In *homicide of necessity* grand in-
quest may present the special
case, and party be presently
discharged; but he may be in-
dicted F f 2

A TABLE OF THE PRINCIPAL MATTERS

- dicted *de novo*, if matter false;
contra, if indictment simply of
murder or manslaughter Page
491, 492
- One indicted on coroner's inquest
is acquitted, petit jury are to
inquire of the manslayer, which
serves as indictment against him
ii. 65, 300
- Indictment *se defendendo* good be-
fore justices of gaol-delivery,
but not of the peace. ii. 130
- A. indicted *quod primo die Maii se-
cundo Eliz. apud C. habens in
manu, &c. gladium, &c. [felo-
nicè] percussit, &c.* and not said
adtunc & ibidem, malè; because
day, year and place relate only to
the having the sword, not to the
stroke ii. 178, 179
- In indictment of murder, *day and
place* as well of stroke as other
act done inducing death as of
death must be exprest ii. 179,
180
- Indictment against A. that he *apud
N. in com. præd.* assaulted B. of
O. *in com. præd. & ipsum adtunc
& ibidem cum, &c. percussit*
nought; it cannot refer to both;
and if only to one, it must be to
the last, and then it is insensible
ii. 180
- Indictment of murder *cujusdam ig-
noti*, good 181
- No need of addition of person
robbed or murdered, save for
distinction ii. 182
- Indictment charges that J. S. *fidem
adhibens* to the prisoner, and
*nesciens potum præd. cum veneno
fore intoxicatum accepit & bibit*,
and says not *venenum præd.*
nought, not to be supplied by
implication ii. 184
- Indictment *quod A. exoneravit
tormentum, &c. versus B. dans
ei unam mortalem plagam*, with-
out saying *percussit*, nought ib
- So if *dedit mortalem plagam*, with-
out *percussit* ib
- If A. be indicted, *quod 1 Dec. &c.
apud, &c. felonice, & ex mali-
tiâ suâ præcogitatâ in & super*
B. *insult. fecit, & cum quodam,
&c. adtunc & ibidem percussit,
&c.* these words *felonice & ex
malitiâ suâ* applied to the assault
run also to the stroke, because
placed in the beginning of the
sentence, and done *adtunc &
ibidem* Page 184, 185
- What requisites to indictment of
murder or manslaughter more
than other indictments ii. 185 to
189
- If alledged that party was killed
with a sword, and proved that
he was killed with another wea-
pon, indictment maintained;
but *contra*, if with another kind
of death, as strangling, &c. 185
- The kind of poison must be al-
ledged; but if proved to be done
with another kind, *bene* ib
- If killing was with a sword, it must
be shewn in what hand offender
held it ib
- In dextrâ suâ*, without saying *dex-
trâ manu*, nought ib
- Price of weapon to be set down, or
else must be said to be *nullius
valoris* 419. ii. 185
- Indictment must shew in what part
of body party killed was wound-
ed, if *super brachium, &c.*
without saying right or left,
male ii. 185
- In sinistro bracio*, instead of *brachio*,
insensible and ill ii. 186
- Wound laid *circiter pectus*, ill ib
- Super partes posteriores corporis*,
nought ib
- But *super faciem*, or *caput*, or *dex-
tram partem corporis*, or *infimâ
parte ventris*, certain enough
ib
- Where length and depth of wound
to be shewn or not ib
- If in evidence it appear to be an-
other kind of wound in another
place, indictment maintained ib
- Usual to alledge deceased was *in
pace Dei*, but unnecessary ib
- Necessary to alledge party died of
the wound, and also time and
place, as well of death, as the
wound given, and why ib
- The

CONTAINED IN THE TWO PARTS.

The form of such allegation *Page*
186

As well in indictment of man-
slaughter, as murder, the stroke
is to be alledged to be *mortalis*
plaga *ib*

Plaga expounded *ib*

If indictment of murder wants *ex*
malitiâ sua præcogitatâ, clergy
allowed *ii. 187*

What indictment on 21 *Jac. a-*
gainst concealing death of bastard
children by the mothers must set
forth *ii. 190, 288*

It need not conclude *contra formam*
stat. act creating no new crime,
but directing only the evidence
ii. 289

If one be indicted and appealed
before same justices for same
murder or other felony, where
there shall be a *cesset processus* on
the indictment; and so where
there is an inquisition before the
coroner of murder, and return-
ed, and likewise indictment for
same offense by grand inquest
ii. 221

What words necessary in indict-
ment of murder to oust clergy
ii. 344

A. indicted as having given the
mortal stroke, *B.* and *C.* as pre-
sent and assisting, if proved that
B. gave the mortal stroke, and
A. and *C.* were present and as-
sisting, it maintains indictment,
and all oust of clergy; *contra* on
such indictment on 1 *Jac. of*
stabbing, he that gave the stroke
in such case shall have his clergy
437, 463. *ii. 185, 292, 344, 345*

Every indictment to oust accessory
before of his clergy by 4 & 5
P. & M. must run *malitiose*, as
in murder, &c. *ii. 339, 344*

How indictment for robbing houses
(within 5 & 6 *E. 6.*) to be laid
in order to oust persons present
and assisting, but not entering,
of their clergy, by 4 & 5 *P.*
& *M.* *521, 522*

How indictment laid on 5 & 6 *E.*
6. for breaking the lodgings of

A. at *Whitehall*, (*king's man-*
sion-house;) and taking thence
several goods of *A.* and others
Page 522, 523

How indictment to be formed on
this *act* *ii. 354, 362*

All lodgings in *Whitehall* part of
the *king's* house, but in an inn
of court each chamber is a se-
veral mansion-house, and whose
it shall be supposed to be 522,
523, 527, 528, 554, 556

Indictment on 39 *Eliz.* against
breaking a house in the day must
precisely, and in what manner,
follow the *act* 525. *ii. 170*

Usual to add *tempore diurno* to oust
clergy *ii. 179*

If either indictment pursue not the
act, or evidence maintain not
indictment, prisoner to have his
clergy; and on such indictment
may be acquitted of stealing
against the *act*, and convict of
simple felony, tho indictment
conclude *contra formam stat.* so
on indictment on 23 *H. 8.* or 5
& 6 *E. 6.* 525, 526, 535

Tho indictments in those cases be
special, and conclude sometime
contra formam stat. yet they in-
clude felony at common law; for
contra formam stat. is unnecessa-
ry, so as circumstances required
by the *act* be pursued; for these
acts make not the felony, but
oust clergy 525, 535

One indicted on 39 *Eliz.* shall not
be ousted of his clergy by any
other *act* 526

If *A.* commits larciny in a dwell-
ing-house within 23 *H. 8.* and
carries the goods into a foreign
county, and be indicted there of
larciny and convict, and jury
find value of goods to be only
12*d.* tho it appear on trial in
foreign county that it was with-
in the *act*, he shall only have
judgment of petit larciny 536

How indictment of burglary to be
laid, and what words essential
549, 550. *ii. 168, 184*

A TABLE OF THE PRINCIPAL MATTERS

- How indictment of burglary shall be laid for *breaking and entring a church* with a felonious intent Page 556
- If *A.* hires a chamber in the house of *B.* for a certain time, and it is broke open, whose mansion-house it shall be supposed ib
- It shall be supposed mansion-house of owner, where lodgings of servants are broke open 557
- How indictment to be laid to comprise both burglary and felony 559, 560
- Where in burglary these words *ad intentione ad furandum*, or commit some other felony are necessary 560, 561
- How indictment to be for burglary, felony, and felony on 5 & 6 E. 6. 560
- Where time of day is material to ascertain the nature of the offense, it must be exprest in indictment, as in burglary, &c. ii. 179
- Indictment of burglary must be *felonice & burglariter fregit & intravit* ii. 184
- In case of burglary or robbing houses, on what statutes principal to be indicted to oust accessory before of his clergy 363, 364
- What words in *larciny* essential 504, 508
- If *A.* feloniously take my horse from me, and *B.* from him, *B.* may be indicted as of a felonious taking from me 507
- Every indictment of *larciny* ought to suppose the goods stolen to be the goods of somebody 512
- Quod felonice cepit quandam peciam panni*—J. S. without saying *de bonis & catallis* J. S. nought ii. 182
- Indictment, *quod felonice cepit bona ignoti, bona capellæ tempore vacationis*, or *bona capellæ in custodia* J. S. good 512. ii. 181
- How indictment to be for stealing bells, or goods from a church ib
- If *A.* have a special property in goods, as by pledge, &c. and the goods be stolen, they must be supposed in the indictment the goods of *A.* Page 512
- If *A.* bails goods to *B.* to keep, &c. and *B.* be robbed of them, felon may be indicted for larciny of the goods of *A.* or *B.* 513. ii. 181
- Indictment for stealing goods of a *feme covert, male* 513
- If goods of an intestate before administration be stolen, they shall be supposed the goods of the ordinary; or if the goods of an executor before probate be stolen, they shall be supposed the goods of the executor; neither ordinary, nor executor need shew his title 514, 515. ii. 181
- But without saying *de bonis & catallis* of the executor, or ordinary, *male* 515. ii. 181
- Digging a dead body out of the grave, and stealing shroud, whose it shall be supposed ib
- If *A.* put a winding sheet on the dead body of *B.* and a thief digs up the body and steals the sheet, it may be supposed *de bonis A.* 515
- Indictment of *larciny* from the person how to be laid to oust clergy by 8 Eliz. 529
- A.* commits a robbery on the highway in com. B. of goods to value of 12*d.* only, and carries them into a foreign county, *A.* may be indicted of *larciny* in foreign county; but he must be indicted of robbery in proper county 507, 536. ii. 349
- If *A.* be indicted of *larciny* in foreign county, and jury find value to be only 12*d.* he shall only have judgment of petit *larciny*, tho it appear on examination on trial, that it was a robbery 536
- Larcinies* committed of several things, tho at several times, and from several persons, may be joined ii. 173
- Indictment, *quod invenit quendam hominem mortuum, ac felonice furatus est duas tunicas*, without saying

CONTAINED IN THE TWO PARTS.

saying *de bonis & catallis cujusdam ignoti*, ill ii. Page 181
Quòd cepit & asportavit—bona & catalla B. without shewing what in certain, ill ii. 183
 Number and value of things stolen to be exprest ii. 182, 183
 Where proper to use the word *pretii*, or *ad valenciam* ii. 183
 But not material, if these terms, be converted ib
 If one *pretii*, &c. be added to several things where it should in clerkship be applied severally, it is good, if party be convict of all; but possibly *contra*, if convict but of part ib
Quòd felonice cepit 20 oves matrices & agnos, or *matrices & verveces*, ill; but *contra*, if 20 oves generally ib
De quatuor riscis & cistis, good, because *synonyma* ib
Quòd felonice abduxit unum equum, nought, without saying *cepit*, &c. ii. 184
Quòd furatus est unum equum, but trespass for want of *felonice* ii. 172, 183
 If a thief finding little about *A.* by menace of death force him to swear to fetch him a greater sum, which he doth, a general indictment of *robbery* will do 532, 533
Violenter in indictments of *robbery* must be both alledged and proved 534
 How indictment must be ib
 To oust clergy indictment and conviction must be of *robbery*, in *vel prope altam viam regiam*, and not *viâ regiam pedestri*, &c. 535. ii. 349
 But if laid *prope altam viam regiam*, sufficient ib
 Disjunctive in *vel prope* usual in these indictments, tho they ought to be certain, yet not substance, but only to ascertain point of clergy ib
Thames alta via regia, and if it were not, yet *near it*; how indictment to be of a robbery

committed in a ship below the bridge Page 535, 536. ii. 349, 350
 How indictment of *piracy* to be to work corruption of blood 355
 In *arson* how indictment to be 567
A. intending to burn the house of *B.* thereby burns the house of *C.* how to be indicted 569
 In *rape*, how indictment must be laid 628, 632. ii. 184
 If one be indicted at a *leet*, *quòd felonice rapuit*, if removed into *B. R.* he shall not answer to it as a felony, but trespass ii. 172
 In case of *escape*, if party hath not been indicted at time of *escape*, how indictment against *gaoler* to be, and how in the case of a *rescue* where party rescued before he was indicted 599
 But if party hath been indicted and taken by *cap.* before *escape* or *rescue*, how then it must be ib
 How indictment must be laid in case of felony for *breach of prison*, if party hath not been indicted before *breach of prison*, and how otherwise 599, 607, 610
 City of *London* indicted for an *escape*, as a misdemeanor, which was not conclusive, but traversable ii. 154, 155
 Indictment of *forgery* after a former conviction, and judgment must recite the record thereof 686
 If one be indicted, for that *ratione tenuræ* of certain lands he is bound to repair a *bridge*, it must be alledged, where those lands lie ii. 181
 Indictment of assault in *quendam ignotum*, good ib
 Indictment against *A.* that he is *communis latro, champartor*, &c. *malè* 512. ii. 181, 182
 But *communis barretator, & pacis domini regis perturbator, & litium seminator*, *benè*; so of indictment, that he is *noctivagus* ii. 182
 Indictment of *barretry*, concluding *contra formam stat. or diversorum statutorum*, good, tho no direct statute against it ii. 191

A TABLE OF THE PRINCIPAL MATTERS

- Whether in *barretry* vill need be alledged ii. Page 180
- How indictment must be for *aiding a maintainer of the pope's jurisdiction* 332
- General rules touching indictments.*
- Husband and wife indicted of felony, such indictment is joint or several, as the fact happens, and on such indictment, *baron* may be acquitted, and *feme* convicted, and *è converso* 46, 516
- Whether indictment be a part or distinct thing from the trial 298 to 301
- Variance between day in indictment of felony or treason, and in evidence, immaterial; yet if variance be great in point of time to avoid the danger of the relation of the attainder to the day in indictment, fit that jury find the true day 361. ii. 179
- In all cases to oust *clergy*, indictment and evidence must both bring case within the *act*, otherwise *clergy* allowed 525, 526, 535. ii. 336
- Whether owner of stolen goods shall have more restored, than what are contained in indictment 545
- Usually at same sessions the several indictments against same person are tried by same jury ib
- Accessory may be indicted with principal, which is most usual; but when indicted severally, indictment must contain certainty and kind of principal felony 623
- Every felony includes misprision, and party may be indicted of misprision only 652, 708
- Where party to answer to a felony without indictment at *king's* suit ii. 156, 149* to 152*
- In all criminal causes most safe and regular way to proceed by indictment ii. 151*
- The indorsement, *billa vera*, makes not the indictment; the bill itself, when affirmed, is the indictment ii. Page 162
- Of the caption of the indictment on return of *certiorari* ii. 165
- The form of the caption, and the analysis thereof, *Norf. ad generalem sessionem, &c.* ii. 165 to 169
- Record of indictment, as it stands on the file of court, wherein taken, is only, *juratores pro domino rege super sacramentum suum presentant*, when returned on *certiorari* is more explicit ii. 165
- Name of county must be in margin of record, or repeated in body of caption ii. 166
- Court, where presentment made, to be exprest ib
- It must appear where sessions held, and that place, where held is within extent of commission; and therefore, if *Dorset* in the margin and caption be *ad generalem sessionem pacis tent. apud S.* and says not *in comitatu præd.* it is nought ib
- So if west-riding in *comit' Eborum* be in the margin, and caption be *apud S. in com. præd'* it shall be quashed, because not said *apud S. in west-riding in com. præd.* ib
- How many justices to be named, but rest may be supplied by the words (*& sociis suis, &c.*) ib
- How title of their authority to be set forth, as *justic. ad gaolam, &c.* ib
- If there be a session by three commissions, as of *gaol. delivery, &c.* if it be returned at a session holden before them, and record be made up, as on all three commissions, if they have jurisdiction to take indictment but by one, it is good, tho not enabled to take it by the other ib
- Where return must mention any, and which of the justices to be of the *quorum*, or not ii. 167
- Where caption faulty in form, same term it may be amended by

CONTAINED IN THE TWO PARTS.

- by clerk of assises, or peace, but not in another term ii. Page 168
- In another term clerk, that returns it, shall be fined for his informal return ib
- Indictment described ii. 169
- Latin* a fixt regular language ib
- False *Latin* did not vitiate indictment ib
- But words of art by omission, or misplacing letters becoming insensible vitiate ib
- Of *insensible and incertain words* ii. 170
- Where verb of *singular number* is used for a *plural*, indictment shall be quashed ib
- Of *abbreviations*, and where construed to best advantage for maintaining indictments ib
- Figures* not allowed in indictments, tho sometime *literal numbers* be in returns ib
- Indictment grounded on offense by statute must bring it within substantial description of it; otherwise *contra formam stat.* will not supply it ii. 168, 192; 193
- If offense be made felony, or otherwise penal by *aet*, and by proviso in same, or any subsequent *aet* some cases are exempted out of it, indictment need not qualify the offense, so as to exempt it out of the proviso; but party shall have advantage of it by pleading *not guilty*, or in same manner shall have advantage of the subsequent statute by 21 *Jac.* ii. 170, 171
- If *aet* be prohibitory, and by a substantive clause gives a recovery of penalty by action of debt, but is silent as to indictment, party may be indicted on prohibitory clause, and thereon fined, but not to recover penalty, but fine ought not to exceed it ii. 171
- But if *aet* be not prohibitory, but only if any shall do such a thing, he shall forfeit 5*l.* to be recovered by action of debt, &c. but mentions nothing of indictment, he cannot be indicted for it ii. Page 171
- If one be indicted for offense, which was at common law, and indictment concludes *contra formam stat.* but in truth is not brought within the *aet*, it shall be quashed ii. 171, 172
- One indicted for *arson*; on *not guilty* pleaded, a special verdict was found, which was adjudged no felony; on same indictment he was adjudged to pillory, &c. *sed quære*, for being tried for felony, he had not those advantages for his defence, as if indicted for trespass ii. 172
- A particular statute must be recited and proved by examined copy ii. 172, 192
- All penal *aets* inducing a forfeiture to the king, or making a felony or treason are general *aets* ii. 172
- A general *aet* need not be recited, but it is sufficient to conclude *contra formam stat. in hujusmodi casu edit. & provis.* but if misrecited, court takes notice of true statute, and rejects misrecital as surplusage ii. 172, 173
- But if recited, and misrecited in a point material, and concludes *contra formam stat. præd.* it is fatal, and indictment quashed ii. 172
- Where *aet* is repealed and re-enacted, or temporary, and expires, or continued to the end of next session, and before it is continued over, how indictment to conclude as to *contra formam*, &c. 667, 706. ii. 173
- Where one *aet* relates to another, as where former makes offense, latter adds a penalty, how indictment to conclude ii. 173
- If one offender, and *several* capital offenses be committed by him, they may be joined in one indictment ib
- If *several* offenders commit one offense, tho in law they are several offenses, yet they may be joined ib
- So

A TABLE OF THE PRINCIPAL MATTERS

So if offenses be of *several* degrees, but dependent one on another, as in the case of principal in first degree, and principal in second degree, and accessory *before* or *after* ii. Page 173

Where joint indictments for *several* offenses of same nature distinctly committed by *several* offenders have been held ill, or not ii. 174

Where *divers* persons are inserted in one indictment, the word *separatim* makes them several ib

The *grammatical order* of the several parts of an indictment ii. 174, 175

If day be inserted, and not year, nought, and shall not be supplied by intendment of (*ult. præterito*), unless so exprest; but if so, sufficient to ascertain year by day of sessions ii. 177

Sessions held 20 *May*, offense supposed on 10 of *May last past*, it shall relate to *day*, and not *month*, and so for the words *next ensuing* ii. 178

One indicted, that he *in festo Sancti Petri*, &c. ill, because two feasts of that name ib

Indictment, *quod primo die Maii*, &c. *in quendam B. insult. fecit*, & *ipsum verberavit*, and says not *adtunc* & *ibidem verberavit*, good; *vi & armis*, *day and place* named in beginning refer to all ensuing *acts*; but *contra* in felony, there must be *adtunc* & *ibidem* to the stroke, or the robbery, &c. and *day and place* of assault insufficient ib

If said that defendant on 1 and 2 of *May* made an assault, and feloniously took, &c. ill, because incertain, to which day felonious taking relates ib

Usual to repeat *adtunc* & *ibidem* to the several parts of fact charged ii. 178, 180

Regularly *vill, or hamlet and county* must be exprest ii. 180

Where time must be repeated, re-

gularly, place must be so too ii. Page 180

Suff. in the margin, indictment supposing fact to be done *apud S. in com. præd.* sufficient; but *contra*, if another county be mentioned in the addition of any party, &c. ib

Indictment not aided by verdict; none of the statutes of jeofails extends to them ii. 183, 193

What is defect of certainty in a count, is much more so in indictment ii. 183

Indictment of felony must alledge fact to be done *felonice*, of treason *proditorie*, of petit treason, *felonice & proditorie* 59. ii 184, 187

Felony or treason at common law was laid to be done *vi & armis*, but now unnecessary by statute 187

So are the words *gladiis, baculis & cultellis* ib

Regularly every indictment ought to conclude *contra pacem*, but need not conclude *contra coronam & dignitatem ejus* ii. 188

Concluding *contra pacem*, and saith not *domini regis*, is insufficient ib

Why indictments conclude *contra pacem*, &c. 130

For offense supposed to be committed in time of former king, and concludes *contra pacem regis nunc*, nought ii. 188, 189

One indicted in time of one king *contra formam domini regis nunc*, may be arraigned for that offense in the time of his successor ii. 189

Indictment not discontinued by demise of the king ib

If the offense be supposed to be begun in the time of one king, and continued in the time of his successor, it must conclude *contra pacem* of both kings ib

If an offense be alledged in the time of one king, and indictment taken in the reign of the succeeding king, and concludes *contra pacem nuper regis, & regis nunc*, good;

CONTAINED IN THE TWO PARTS.

good; *regis nunc* surplufage
 ii. Page 189
 Where indictments shall conclude
contra formam statuti, or *statuto-*
rum, or not, and where only
 surplufage 468, 561, 667,
 ii. 189 to 194
 If an offense be at common law,
 and also prohibited by statute
 with a corporal, or other penalty,
 party may be indicted at com-
 mon law; and if it conclude not
contra formam stat. it stands only
 as indictment at common law,
 and he can receive only the
 penalty the common law inflicts
 ii. 191, 192
 Great strictnesses required in in-
 dictments, the reproach of the
 law, &c. ii. 193
 Rare to take any exceptions to in-
 dictments before conviction, save
 on indictments removed into *B.*
R. by *certiorari*, which *B. R.*
 may in discretion hear or not
 hear, but remand prisoner and
 indictment ii. 237
 If exceptions to an indictment ap-
 pear material, court can quash
 that, and direct a new bill to
 be sent to grand jury, wherein
 faults may be amended, and pri-
 soner arraigned *de novo* ib
 One attainr by outlawry shall not
 be indicted till outlawry reversed
 ii. 252
 For what causes indictments abated.
 Vide Abatement.
 Where best to arraign prisoner on
 indictment, or coroner's inquest,
 or both, and for other matters.
 Vide Arraignment.
 Where offender indictable. Vide
 County.
 What evidence maintains indictment.
 Vide Evidence.
 What the quality of indictors.
 Vide Jury.
 For indictments in leets and torns.
 Vide Leet, Sheriff.

Infant.

Wherein the civil and common law

agree, or differ with respect to
 the full age of a man for making
 contracts, being a procurator or
 executor, or consenting to marriage

Page 17, 28

As to crimes, into what periods
civil law distinguisheth the ages,
 and at what age it presumeth
 men *capaces doli*, or not 18, 19, 20

Both civil and common law leave
 the question, whether party *ca-*
pax doli, or not, *ad arbitrium*
judicis on the circumstances, and
 with what caution 18

By common law, as to offenses not
 capital, in some cases infant is
 privileged by his non-age; and
 herein privilege is all one, whe-
 ther above fourteen or under, if
 he be under twenty-one years;
 but with some and what differen-
 ces 20

Infant convict of riot, &c. shall
 be fined and imprisoned, and
 not be privileged barely because
 under twenty-one; but court *ex*
officio on his trial ought to ex-
 amine, whether he is *doli capax*,
 and had discretion to do the *act*
 wherewith he is charged ib

But if offense charged be a mere
 non-feasance, (unless of such a
 thing as he is bound by tenure,
 or the like to do, as to repair
 a bridge, &c.) there in some
 cases he shall be privileged by
 his non-age, if under twenty-
 one, tho above fourteen; be-
 cause *taches* in such case shall
 not be imputed to him ib

If infant in *assise* vouch a record,
 and fail at the day, he shall not
 be imprisoned; and yet *Westm.*
 2. that gives imprisonment in
 such case, is general ib

If *A.* kills *B.* and *C.* and *D.* are
 present, and attach not offender,
 they shall be fined and imprison-
 ed; but if *C.* within twenty-one,
 he shall not 21. ii. 75

Where corporal punishment is but
 collateral, and not direct inten-
 tion of proceeding against infant
 for his misdemeanor, there in
 many

A TABLE OF THE PRINCIPAL MATTERS

- many cases infant under twenty-one shall be spared, tho possibly punishment by statute *Page 21.*
ii. 75
- If infant of eighteen be convict of *disseisin* with force, he shall not be imprisoned, and yet *feme covert* shall *ib*
- If infant be convict in action of trespass *vi & armis*, the entry shall be *nihil de fine, sed pardonnatur, quia infans*; if a *capiatur* be entered, it is error, for it appears judicially, to court, that he was within age, when he appears by guardian, nor shall he be *in misericordia pro falso clamore* *ib*
- General statutes, that give corporal punishment, extend not to infants *ib*
- But where a fact is made felony or treason, it extends as well to infants, if above fourteen, as others 21, 22
- Civil law uncertain in defining *ætas, pubertati proxima*; but laws of *England*, antiently determined it to be twelve years for both sexes; under that age none could regularly be guilty of a capital offense, and above that age he might, or not, according to circumstances, that might induce court or jury to judge him *doli capax, vel incapax* 22, 23, 24, 515
- Infant of twelve compellible to take oath of alligiance 23
- Against infant under twelve process of outlawry on indictment was not awardable; and if awarded, error; but if above that age, such process was awardable 23, 24
- If infant under twenty-one shall confess indictment, court ought not to record it, but put him to plead *not guilty*, or at least inquire by inquest of office of truth of fact 24, 27, 491, 492
- How the law now is with respect to infants and their punishments 25 to 29
- Infant above fourteen and under twenty-one is equally subject to corporal punishments, as well as others of full age, for it is *præsumptio juris*, that after fourteen they are *doli capaces* *Page 25*
- A lad of sixteen convict of successive wilful burning three dwelling-houses, &c. had judgment to die, and was executed *ib*
- Fourteen years common standard, at which both males and females are subject to capital punishments for offenses committed by them at any time after that age 25, 26, 28
- Infant under fourteen, and above twelve, is not *primâ facie* presumed *doli capax*, and therefore regularly for a capital offense committed under fourteen is not to be convicted, but may be found *not guilty*, or jury may find specially, and how; in which case court ought to discharge him, because no felony 26 to 29
- Yet if it appear to the court that he was *doli capax*, when offense committed, he may be convicted and suffer death, tho he hath not attained *annum pubertatis, viz.* fourteen 26, 434, 569, 570
- Infant [ten years old] that had killed his companion, and hid himself, hanged; *malitia supplet ætatem* 26
- A girl of thirteen burnt for petit treason *ib*
- If infant be above seven, and under twelve, and commit a felony, he is *primâ facie* to be judged *not guilty*, and found so, because supposed not of discretion to judge between good and evil; yet in that case, if it appear by pregnant evidence that he had such discretion, judgment of death may be given against him 26, 27
- Infant of nine killed infant of like age, he confessed felony, and on ex-

CONTAINED IN THE TWO PARTS.

examination found he hid the blood and body; held he ought to be hanged Page 27
 Circumstances to be inquired of by jury ib
 If convict, court cannot *ex officio* discharge infant ib
 If infant be *infra ætatem infantiae*, viz. seven years, he cannot be guilty of felony, whatever circumstances proving discretion may appear, for *ex præsumptione juris* he cannot have discretion and no averment shall be received against it 27, 28
 As to matters of crime, females have same privilege of non-age, as males 28
 If infant be first arraigned and acquitted on indictment of murder by grand inquest, he may plead that acquittal on arraignment on coroner's inquest, and that will discharge him 28, 29
 Infant under fourteen presumed unable to commit a rape, but present and assisting therein may be a principal 630
Act making offense felony binds not one under fourteen 706

Informations.

11 H. 7. gave power to proceed in all penal statutes by information before justices of *assise* and peace, treason, murder, and felony excepted ii. 151*
 Ill use being made of it, repealed ib
 Tho informations are often practised in the crown-office in cases criminal, and by many penal *acts* the prosecution is by the *acts* themselves to be by bill, plaint, information, or indictment, yet prosecution in capital cases is still to be by indictment; except in cases excepted, which see ii. 156 to 152*
 In all criminal causes the most regular and safe way, and most consonant to *magna charta*, is by

presentment or indictment, of twelve sworn men ii. Page 151*
 37 H. 8. for curing omission of the words *vi & armis, gladiis, &c.* in indictments, extends not to informations ii. 187

Inquest of Office.

If jury find one, whom they acquit of treason or felony, fled; they must inquire what goods he had; but this only an inquest of office, and traversable by party, or those who have the goods 362
414, 493. ii. 154, 301
 Where in case of inquest of office jurors not finding according to evidence have been fined ii. 311
Where court may inquire ex officio, whether prisoner be of years of discretion. Vide Infant.
Whether he be compos mentis. Vide Idiot, &c.
Where one stands mute ex visitatione Dei, or ex malitiâ. Vide Mute.
Vide Coroner per totum.
 Inquisition of Death. *Vide Coroner, Felo de se.*

Intention.

To be tried by circumstances 229
429, 508, 509
 In cases of larciny what are circumstances evidencing a felonious intent 509
 Antiently, tho not now, *voluntas reputabatur pro facto* 532
 If primary intention be to beat, tho killing may be the effect, yet it is not such felonious intent as makes burglary 561

Ireland.

Of the laws *there* of treason 147
Cessing of soldiers expounded; treason by 18 H. 6. ib,
 It was chief treason charged on earl of Strafford king's lieutenant *there*, what his defense ib
By

A TABLE OF THE PRINCIPAL MATTERS

- By 10 H. 7. in *Ireland* (*Poining's law*) all statutes of *England* are enacted to be observed *there* Page 147
- 25 E. 3. declaring treasons, and 1 H. 4. enacting, that nothing shall be treason, but what is within that *act*, treasons enacted *there tempore* H. 6. and afterwards before 10 H. 7. seem not to be repealed ib
- General introduction of statutes of *England*, being an affirmative law cannot be intended to take away those *acts*, which were made in *Ireland* for declaring treason, as 18 H. 6. ib
- Act* for earl of *Strafford's* attainder justly repealed, and why ib
- The part of the dominions, yet no part of the realm of *England* nor *infra quatuor maria* 155, 317, 693
- Ireland* hath same laws for treason that *England*, and some more, yet for treason in *Ireland* offender may be tried in *England* by 35 H. 8. 155
- A peer there tried *here* for treason by a common jury 155, 317, 693
- Judgment.**
- Court *ex officio* to give judgment for *treason*; but if king's serjeant or attorney prays it, how prayer to be entered 396
- The form of severe judgment for *high treason* 350, 351, 382 ii. 396, 397
- King often pardons all, but beheading, under great seal, &c. 351, 370. ii. 412
- Women to be drawn and burnt, as well in *high* as *petit treason* 351. ii. 397, 399
- Form of less solemn judgment which is only to be drawn and hanged 351. ii. 397
- But women to be drawn and burnt 351
- For counterfeiting great or privy seal, or privy signet, or sign manual Page 187, 351, 352.
 ii. 398, 399
- For counterfeiting or clipping, washing, &c. king's coin, or foreign coin made current 219, 220, 223 224, 351 to 354. ii. 397, 398
- For knowingly importing false money ad instar the king's coin, with intent to merchandize, &c. 220
- In new treasons it is to be the most severe judgment; but *contra* as to coin 220, 221, 352, 353. ii. 396, 397
- What the consequents of judgment in *treason* 354
- In *high treason* marshal is mentioned as officer, by whom execution is to be made, in the very judgment in *B. R.* ii. 411
- Judgment of *treason* given by the lords *per assent du roy* as a transcendant punishment of the murder of the duke of *Gloucester* 266, 267
- There may be reasons not only in policy, but justice, sometimes for a parliament to vary the punishment of crimes, in substance the same, when differenced by circumstances 270
- Judgment for *misprision of treason* 374. ii. 400
- For *petit treason* 382. ii. 399
- A wife or servant accessory before to *petit treason*, judgment to be as against principal 379
- But if accessory, whether before or after, be a stranger, judgment, shall be *quod suspendatur*, &c. 382
- Judgment of *peine fort & dure*, where prisoner challenges thirty six in *petit treason*, as well in appeals as indictments, and in case of men, as well as women ii. 319, 399, 400
- Misprision of petit treason* punishable by fine and imprisonment; so is *misprision of felony* 375
- Judgment in all cases of *felony*, *quod suspendatur per collum, quousque mortuus fuerit* ii. 399
- What

CONTAINED IN THE TWO PARTS.

What judgment by *Westm. 1.* in *misprision of felony*, if concealer an officer, as sheriff, &c. or if a common person Page 374, 375

If jury in case of indictment for *murder* or *manslaughter*, find the *homicide* to have been involuntary, & sic, &c. court may give judgment against conclusion of verdict, as that the fact is *manslaughter*, tho verdict conclude *per infortunium*, or *se defendendo* 471

Where thief is killed of necessity in pursuit, if special matter be found, the killer shall have judgment, *quod eat inde sine die*, because it is no felony, nor causeth any forfeiture, so much as of goods, and so differs from *se defendendo*, or *per infortunium* as to forfeiture of goods ii. 304

One indicted of *homicide se defendendo*, or *per infortunium* must plead to it, or confess it, and no other judgment, but *remittitur prisonæ*, or he is bailed *ad expectandam gratiam regis* ii. 395

If one by coroner's inquest be found to have killed a thief assaulting to rob him, &c. he shall not be arraigned on that indictment, but be dismissed without any judgment ib

If one be indicted of *murder* or *manslaughter*, and on *not guilty* special matter is found, judgment is, *quod eat inde quietus*, which is a perpetual bar; but if found guilty *se defendendo*, judgment is, *quod expectet gratiam regis* ii. 395

Judgment in *grand* and *petit larciny* 504, 530. ii. 400

In *theft-bote* ii. 400

Judgment of *peine fort & dure*, and how entered ii. 319, 399, 400

How judgment in case of *allowance of clergy* entered ii. 395

How a *peer* must aver his peerage, and pray benefit of 1 E. 6. and how judgment for his deliverance shall be entered ii. 396

If it be alledged that prisoner is a clerk in orders, how judgment shall be entered after his reading; and the like, if he plead *king's pardon of burning in the hand* ii. Page 396

If a *layman* pray his clergy, and it appear on record that he had it before, how the entry is ib

And so if he prays his clergy, and cannot read ib

Where judgment on *acquittal* is only *quod eat inde sine die*, and there is defect in indictment, it shall be supposed to be given on that defect ii. 248

Judgment of *eat inde sine die*, general and special ii. 392

In *covenant* a special verdict is found, and on perusal of declaration a fault therein appears, how judgment shall be, so as not to be a bar in another action ii. 393

If given generally, it shall be intended on verdict and merits ib

In a *quare impedit* by the *king* issue is joined, and found for defendant, it is alledged in arrest of judgment that no patron is named in the writ, judgment shall be entered generally, *quod eat inde sine die*, and not specially on plea in abatement; but it shall not bar the *king* in a new action, for the *eat sine die* shall be applied to the plea to the writ ib

If one plead in bar to indictment yet if indictment insufficient, whether *eat sine die* shall be applied to insufficiency of indictment, or to plea in bar ib

Fit to have the *eat sine die* special in that case, and how ib

If one plead *not guilty*, and be acquitted, judgment is not only *quod eat inde sine die*, but *ideo consideratum est, quod eat inde quietus*, tho at *king's suit* ii. 394

If entry be *quod eat inde quietus*, prisoner cannot be arraigned again, tho indictment insufficient, till judgment of acquittal reversed,

A TABLE OF THE PRINCIPAL MATTERS

- reversed, because it must go to matter of the verdict ii. Page 394, 395
- Where prisoner excepts to insufficiency of indictment, or court doth it *ex officio*, how judgment to be ib
- Judgment on *auterfoits acquit convict* or *attaint*, and confession by king's attorney, how to be entered ii. 392
- How judgment entered on *plea of pardon*, and how *allowance* thereof entered in the margin ii. 391 392
- One outlawed of *felony or treason*, tho no other judgment but *utlegatum est per judicium coronatorum* is of itself an attainder, and subjects offender to such award thereon to be made by court, as is suitable to the offense ii. 399
- Judgment *quod suspendatur*, &c. to be given, as well against a peer, as another, in case of *felony*, and cannot otherwise be given by court, or executed by sheriff ib
- Tho judgment regularly against the king is *salvo jure regis*, yet *contra* in case of life ii. 247
- Former *acquittal* by judgment not only a bar of new indictment for same offense; but if party is indicted *de novo*, and outlawed thereon, he may assign his former *acquittal* for error in that outlawry, and reverse it for that cause, and in that case how judgment to be ii. 243, 244
- These words, *Eyt judgement de vy* & *member* in an *aet* create a felony 627, 641, 703
- Court may respite judgment on *acquittal*, if against full evidence ii. 310
- In *England* law more determinate than in other places, and leaves as little as may, to *arbitrium judicis* 13
- It doth not allow an arbitrary power to the judge to change punishment law inflicts 19
- Thorp*, C. J. was sentenced to death before special commissioners assigned *ad judicandum secundum voluntatem regis*, in respect of the oath made by him to the king and broken, whereby he had bound himself to that forfeiture, that judgment was affirmed in parliament, but with what caution to prevent such arbitrary course of proceeding for the future Page 262, 263
- One indicted of *arson* pleaded *not guilty*, and a special verdict was found, and special matter adjudged, no felony; yet on same indictment prisoner adjudged to the pillory; *sed quære* ii. 172
- One indicted of felony before justices of *oyer and terminer*, &c. is convicted, if record of conviction and prisoner be removed into B. R. B. R. may give judgment thereon, but what to be done previously thereto ii. 401, 404
- No other remedy before 11 H. 6. & 1 E. 6. for judgment to be given on persons reprieved before judgment 401
- Where prisoner hath not always from his arraignment remained in custody of court, where he first had judgment, but is brought in by *cap.* by sheriff, he shall not be estopped from saying *he is another person*, and issue may be taken thereon, and shall be tried before execution awarded; and if he stand *mute*, it shall be enquired *ex officio*, whether of malice ii. 402, 407
- But *contra*, if in custody of same court from his first arraignment, or if he had been bailed, and came in and rendered ib
- Where party outlawed or abjured comes by process into B. R. he shall be demanded what he can say why execution should not be awarded on record removed; and if he confess himself, *same person*

CONTAINED IN THE TWO PARTS.

person, execution shall be awarded
 ii. Page 402, 407
 By 14 H. 6. justices of *nisi prius*
 on transcript of record have
 power to give judgment and
 award execution; but then pri-
 soner must be sent by *habeas*
corpus to sheriff of county, where
nisi prius is, or else shall be
 bailed to appear *there* ii. 403,
 404

But they may return *postea* into
B. R. and there judgment may
 be given, as at common law
 ii. 404

In what cases execution shall not
 be awarded without demanding
 what prisoner has to say against
 it ii. 401, 407, 408

Form of award of execution in
B. R. ii. 409, 411

Vide Corruption and Restitu-
 tion of Blood, Execution and
 Reprieve, Forfeiture, Gaol-
 delivery, King's Bench, Oyer
 and Terminer.

Jurisdiction.

Where temporal judge may inci-
 dently take notice, whether a
 tenet be *heresy*, or not 400, 407
 408

Interpretation of a statute belongs
 to common law 408

Justices of *C. B.* cannot hold plea
 on indictment or appeal in capi-
 tal causes 498

Where proceedings of judges in
 capitals without strict extent of
 their commission, or where their
 commission happens to be deter-
 mined, are great misprisions
 498, 499

Altho felony be limited to special
 jurisdiction, yet misprison of it
 may be tried by a common jury
 and before general commissioners
 of *oyer and terminer* 653

A justice of peace of county where
 fact done, cannot in foreign
 county do any *act* of jurisdiction,
 Vol. II,

as imprison, but what he may
 do Page 581. ii. 50, 51
 Vide Admiralty, Arrest, Com-
 mission, Court, Gaol-delivery,
 Homicide, Justice of Assize,
 Justice of Peace, King's
 Bench, Murder and Man-
 slaughter.

Jury.

Grand Jury.

Special provision made for quality
 of indictors in *Lancashire* 286
 ii. 52*

So in cases of murders, &c. com-
 mitted in *king's* palace ii. 53*

Of grand inquests before justices in
Eyre ib.

On summons of a session of the
 peace, form of precept for re-
 turn of grand jury; a *scire fa-*
cias also issues to all coroners,
 constables, &c. to be there at
 that day 154*

According to others, a *venire fa-*
cias issues to summon grand jury.

Vide the form ib

On commissions of *oyer and termi-*
ner, or *gaol-delivery*, form of like
venire ib

On this precept sheriff returns
 twenty-four or more out of
 whole county, *viz.* a compe-
 tent number out of every hun-
 dred, out of which grand in-
 quest of sessions of peace, *oyer*
 and *terminer*, or *gaol-delivery*
 are taken and sworn *ad inqui-*
rendum, &c. not as antiently in
Eyre, which was a kind of
 grand inquest out of every hun-
 dred ib

In some counties which consist of
 gildable and such franchise,
 where antiently several justices
 of *gaol-delivery* sat, as in *Suffolk*,
 there are two grand juries, one
 for the gildable, another for the
 franchise ib

Indictors to be *probi & legales*
homines, and must be so returned;
 G g and

A TABLE OF THE PRINCIPAL MATTERS

- and this holds, as well in coroner's inquests, as other indictments or presentments ii. Page 155*, 167
- If any of them be outlawed, tho in a personal action, it is pleadable in avoidance of indictment 303. ii. 155*
- Who not *probi & legales homines*; where one is not *legalis homo*, tho twelve beside without exception, indictment may be quashed by plea ii. 155*, 167
- They must be *king's liege* people ii. 155*
- And must be returned by sheriff or bailiffs of franchises, without nomination of any, save by sworn bailiffs ib
- All indictments taken contrary, void ib
- What freehold indictors ought to have ib
- By statute how justices of *gaol-delivery*, or peace, (one of *quorum*) in open sessions may reform panel of grand jury ii. 36, 155*, 156*
- Grand jury sworn first day commonly serves whole sessions of peace, &c. yet court may grant another grand inquest to be returned and sworn, and in what that may be ii. 156*
- If on record it appear that grand inquest was returned after first day of sessions, unless adjournment be entered on record, it is erroneous ib
- By statute grand inquest may be impannelled to inquire of concealment of another grand inquest, and tho it mentions only a grand inquest to be returned by justices of peace, yet it extends to *B. R.* and possibly to sessions of *oyer and terminer*, and *gaol-delivery*; tho that can rarely come in question, because sessions of peace ordinarily accompany those commissions ii. 156, 157, 160
- This proper way of punishing grand inquest, if they refuse to present such things as are within their charge ii. Page 157
- Grand inquest before justices of *gaol-delivery*, &c. ought only to hear evidence for the *king*, and in case of probable evidence ought to find the bill, and why, (*sed quære*) ib
- Where they may return the bill *ignoramus* ib
- If it appear that *A.* was killed by *B.* and a bill of murder be presented, regularly they ought to find the bill for murder, and not for manslaughter, &c. and why 491, 492. ii. 158
- If a bill be against one for murder, and grand inquest on evidence before them, or their own knowledge be satisfied, that it is but *per infortunium* or *se defendendo*, and accordingly return bill specially, court may remand them to consider better of it, or hear evidence at the bar, and accordingly direct grand inquest ii. 158
- A judge blamed for fining grand inquest for such a return ib
- If a bill be for murder, and it doth *constare de personâ occidentis*, whether they can find bill for manslaughter, and *ignoramus* for the murder, and whether court be bound to receive such a return ii. 158 to 162
- Whether they can be fined for such a return ib
- If evidence to grand inquest be given at the bar on indictment in *B. R.* and grand inquest will not find a bill according to direction of that court, in what instance they are fineable ib
- If justices of *oyer and terminer*, or *gaol-delivery*, having heard evidence at bar, grand inquest will not find according to their directions, justices may bind them over to appear in *B. R.* and on information against them, they may be fined, (*sed quære*) ii. 160
- Fines set on them by justices of peace, *oyer and terminer*, and *gaol-*

CONTAINED IN THE TWO PARTS.

- gaol-delivery* for concealments or non-presentments in any other manner than that prescribed by 3 H. 7. not warrantably by law
ii. Page 160
- Progress of fines set on juries, first on grand inquests, then on petit juries for not finding according to direction of court, and then on jurors, in civil causes for not finding in point of fact according to court's direction
ii. 160, 311
- Objections against setting such fines
ii. 160, 161
- Grand jury sworn to keep *king's* council undiscovered; disclosing whereof was formerly felony, which is now only fineable ii. 161
- If thirteen or more be of grand inquest, a presentment by less than twelve ought not to be; but if there be twelve assenting, tho some of the rest of their number dissent, it is a good presentment ib
- But on trial by petit jury, it can be by no more or less than twelve, and all assenting to the verdict ib
- If presentment be delivered into a court of sessions and received, no averment lies, that it was not assented to by twelve ii. 162
- Contra*, in case of presentment by a leet, for party distrained may so aver ib
- Why indictors presumed to be in different ib
- A good exception, that one procured himself to be returned on grand inquest ib
- If bill be for murder, and they return it *billa vera quoad* manslaughter, and *ignoramus quoad* murder, what words it is usual to strike out in presence of grand jury, and so to receive bill ib
- What safest way with respect to this and like cases ib
- Indorsement makes not indictment, but bill affirmed ib
- Difference between presentment by grand jury of county and a liberty ii. 167, 168
- Indictment of *aliens* to be by grand inquest of *English* ii. Page 271
- In what county party indictable. Vide County.
- Vide Indictment, Presentment.
- Petit Jury.*
- By 27 *Eliz.* precedent of *commission* to give judgment without trial by jury *primæ impressionis*
336
- In *dubiis* rather to incline to acquittal than conviction; caution against the wit and invention of accusers, and odiousness of the accused 87, 300, 509, 636
- Not to be transported with heinousness of the offense 636
- Usually at same sessions the several indictments against same persons tried by same jury 545
- Jurors triers of credit of witnesses, as well as truth of fact 635.
ii. 235, 276, 277, 313
- After *not guilty* received and recorded, sheriff returns pannel of jury ii. 293
- Oath of jury ib
- The form of charge given by clerk to jury; containing the effect of their inquiry ii. 294
- Tho there be twenty prisoners at the bar for several felonies, and the oath is general to try between *king* and prisoner at the bar, yet jury to inquire of no more than what particularly charged with; and tho twenty have pleaded and stand at the bar, when jury is sworn, yet court may stay at any number, and jury stand charged with no more ib
- When they go from the bar, and have brought in their verdict, then if same jury pass on the remaining prisoners, yet they are to be called over again, and reminded of their challenges, and jury sworn *de novo* on their trial ib

A TABLE OF THE PRINCIPAL MATTERS

- By antient law, if jury sworn had been once particularly charged with a prisoner, it was commonly held they must give up their verdict, and they could not be discharged before
ii. Page 294
- Yet contrary course hath long obtained
ii. 295
- Where court may discharge jury sworn, and charged to try one *non compos*
35
- If after jury sworn and departed from bar, one wilfully goes out of Town, the eleven cannot give any verdict without the twelfth; but twelfth shall be fined for his contempt; and that jury may be discharged, and new jury sworn, and new evidence given, and verdict taken of new jury
ii. 295, 296, 309
- If a jury be charged with several prisoners, and court finds jury partial to one, court may discharge jury of that prisoner, and put him on his trial by another jury
ii. 296
- Twelve sworn to try the issue; after departure *A.* one of them leaves his companions; by consent of all parties *B.* another of the pannel is sworn in *A.*'s place, *A.* returns, and being examined, *why he departed*, answered to *drink*, and denied, on oath, that he had spoken with defendant; whereon *B.* was discharged, and verdict taken of *A.* and the other eleven, and *A.* fined for contempt
ib
- If thirteen be sworn by mistake, swearing of last is void, and the other twelve shall serve
ib
- No verdict can be taken of less than twelve, and it is error; and so in a presentment; but if twelve be recorded sworn, no averment lies that one was unsworn
ib
- Court at common law may on just cause remove a juror after sworn
ib
- When jurors depart from the bar, a bailiff ought to be sworn to keep them together, and not to suffer any to speak with them
ii. Page 296
- After their departure they may hear one of the witnesses again in open court, and may desire to propound a *question* to the court for their satisfaction; and it shall be granted, so it be in open court; but if otherwise, this appearing by examination in court, and indorsed on *postea* will avoid the verdict
ii. 296, 307
- If they agree not before departure of justices of *gaol-delivery*, they must be conveyed along in carts, and judge may take and record their verdict in a foreign county; *quare*, whether in such cases, the session may be adjourned before verdict taken
ib
- If there be eleven agreed, and but one dissenting, who says he will rather die in prison than consent, yet verdict shall not be taken by eleven, nor refuser fined or imprisoned
ib
- For most part in *Eyre* petit jury were all of same hundred where offense done; but now jury that tries, as well as inquires is generally of rest of county
ii. 301
- Any of the jury eating or drinking before they have given up their verdict, fineable
ii. 297, 306
- But antiently, if at charges of either party, verdict set aside, but not so now
ib
- If at charges of prisoner, afterwards found guilty, verdict stands
ib
- But if they acquit him, judge before whom verdict given, may record special matter, and thereon verdict shall be set aside, and a new trial granted
ib
- A jurymen, who hath a piece of evidence in his pocket, and after jury sworn and gone together, shews it to them, is fineable; but verdict not avoided, tho case appears on examination
ii. 306, 307
- But

But if, after jury sworn, either party deliver a piece of evidence to jury, and verdict is given for him, it shall avoid it; but then it must appear by examination, which must be indorsed on *postea* or verdict, so as it appear of record, and not barely by *affidavit* made after; but if verdict be given against him that delivered the evidence, it is good

ii. Page 307

If a piece of evidence under seal be read in court, jury ought regularly to have it with them; but *contra*, if not under seal ib

If after jury sworn, a piece of evidence not under seal be by court delivered to jury, it avoids not the verdict ib

So if delivered by a mere stranger, if verdict given against him, on whose behalf delivered ib

If after jury gone from bar, they send for a witness, who repeats his evidence to them, this appearing by examination, and being indorsed on *postea* avoids the verdict; but witness may be heard again in open court, and court or parties re-examine him

ii. 296, 307

If depositions are read in open court to the jury, and as they are going from the bar, solicitor for the king, without consent of parties, or order of court delivers copies of them to the jury, if they find against him, on whose part these were delivered, verdict is good; but if for him, and this appears by examination indorsed on *postea*, verdict shall be quashed, and a new *venire* or award for new jury returned

ii. 308

After evidence given, where divers written evidences are read on both sides, and clerk is making up his bundle of evidences under seal to deliver to jury, solicitor for plaintiff delivers a bundle of depositions to jury, some whereof were read, some not,

and on examination this appeared, tho jury swore they opened not bundle delivered by solicitor, yet verdict for plaintiff for this cause avoided (matter being indorsed on the record), and a new *venire* awarded ii. Page 308

It might have been a misdemeanor for jury to have looked into bundle delivered by solicitor ib

If party after jury sworn speak with a jurymen of foreign business, this avoids not verdict after given for him ib

But if he, or any in his behalf say to a jurymen after his departure from the bar, and before verdict given, *the case is clear for plaintiff*, this shall avoid verdict, if given for him, for it is new evidence ib

If *A.* be challenged off, and twelve more sworn, yet *A.* goes with them, and is present at their consultation, if *A.* gives no new evidence, nor intermeddles, verdict good, but *A.* shall be fined ii. 309

If one of the indictors be returned on petit jury, and do not challenge himself, he shall be fined ib

If a jury say *they are agreed*, and it being asked, who shall say for them, they say *their foreman*, but on further inquiry they are not agreed, every one of them shall be fined apart ib

If a jurymen be called and refuse to appear, or if having appeared withdraw himself before sworn, fineable ib

So if challenged, and while it is trying he withdraw, and challenge be over-ruled, and he be not present to be sworn ib

If eleven were agreed, and the twelfth refused, formerly such jurymen hath been fined, and inquest taken by the other eleven ib

But both these courses now disallowed ib

If jury convict against reason and evidence, or without evidence,

A TABLE OF THE PRINCIPAL MATTERS

- and against direction of court, court may reprieve convict before judgment, and certify *king* for his pardon ii. Page 309, 310
- Court may respite judgment on acquittal, if against full evidence ii. 310
- In such case *king* may have an attainder ib
- By statute justiciar or steward, before whom any one is acquitted of felony against pregnant evidence in *Wales*, or the *Marches* thereof, may bind over the jurors, &c. ib
- Several instances of jurors finding against evidence, being fined, but not warranted by law ii. 160, 310 to 314
- Where fined for their confederacy and practice ii. 311
- Where in case of inquest of office jurors not finding according to evidence, have been fined ib
- Whether *B. R.* can fine jurors for verdict against evidence ib
- Jurors to be freemen, regularly freeholders ii. 264
- Legales*; without any just exception ib
- De vicineto*; but this not strictly required, for they of one side of the county are by law *de vicineto* to try an offense of the other side of the county ib
- By antient law, if jurors by mistake or partiality give their verdict in court, yet they may rectify it before recorded, or go together again and reconsider it ii. 299, 300, 310
- If recorded, they cannot retract, or alter it ii. 300
- In felony or treason no privy verdict can be given ib
- For jury process. Vide Trial.
- Vide Challenge, Verdict.
- Justice of Assise and Nisi prius.**
- Justices of assise are to send their records determined into the Exchequer at *Michaelmas* ii. 31
- By statute *no man of law* shall be justice of assise, where born, or he doth inhabit, but it is usually dispensed with by a *non obstante* ii. Page 32
- Whether, by 27 *E. 1. de finibus*, they may deliver gaol without any other commission, and give judgment of felons ii. 39, 403
- Safe to have a special commission for that purpose ii. 39, 40, 403
- In case of counterfeiting coin on 3 *H. 5.* they expressly must have a special commission ii. 40
- If indictment in the country had been removed into *B. R.* and prisoner *there* had pleaded *not guilty*, after 27 *E. 1.* and before 6 *H. 8.* the transcript of record might have been transmitted to have been tried at *nisi prius*, and so in appeal ii. 39, 403
- Naming them justices of *nisi prius* in 27 *E. 1.* is nothing, but the description of their persons, to whom commissions of *gaol-delivery* shall be directed ii. 40
- Justices of *nisi prius* could not at common law give judgment in appeal or indictment sent them out of *B. R.* by *nisi prius* to be tried, no more than in other ordinary civil causes, because they have but transcript of record, and their commission is only *ad triandum exitum* ii. 403
- In appeals, justices of *nisi prius* may inquire of abettors, and give judgment, and if plaintiff nonsuit, arraign prisoner at *king's* suit ii. 41
- May allow clergy to a convict of manslaughter on appeal ib
- May by statute proceed to trial and execution on indictment removed by *certiorari*, and sent down to be tried by them ib
- By 14 *H. 6.* have power in all felonies and treasons to give judgment, and to award execution 350. ii. 403
- This statute gives them no power to inquire of abettors in appeal, nor

nor to arraign on a nonsuit before them at king's suit

Page 350. ii. 403

Justices of *nisi prius*, *nient obstante* 14 H. 6. may, in case of indictment or appeal sent them out of B. R. return *postea* into B. R. and there judgment may be given as at common law ii. 404

Justice of Peace.

They have no jurisdiction in treason, except as a felony [which treason includes], and as a breach of the peace; they may take examination of traitors, and imprison them, and take information of witnesses, and bind them over, and transmit these examinations and informations to next gaol-delivery, &c. 350, 372, 580. ii. 44

They cannot regularly arraign, try, and give judgment in treason, unless in such cases, as are by special *aet* committed to their cognizance, because their commission extends not to it 350, 372. ii. 44

Per Rolls, C. J. they may take indictment of treason, tho they cannot try it 372

By some *aets* may take indictments of particular treasons, but must certify them into B. R. or gaol-delivery ii. 44

May issue their warrants within precincts of their commission for taking persons charged of crimes within cognizance of sessions, and bind them over to appear there, tho not indicted, notwithstanding lord Coke's opinion to the contrary 579

Where justice of foreign county may grant his warrant, and commit offender; and where offender taken in a foreign county must be carried before a justice of proper or foreign county, or which of them. Vide *Arrest*.

If A. be in commission of peace in

proper county, and happen to be in a foreign county, and complaint is made to him of a felony done in proper county, as he cannot issue a warrant to take party, so neither can he imprison in foreign county, because an *aet* of jurisdiction; but he may take oath of party robbed in pursuance of 27 Eliz. or may take examination or information, or recognizance in foreign county (*sed quære* of the last), but cannot compel them by imprisonment Page 581. ii. 50, 51

One is a justice in two adjacent counties, tho by several commissions, whilst he lives in one county, may send his warrant to arrest in the other 580

Convenient, tho not always necessary, to take information on oath; if party suspected, then to set down cause of suspicion 582

When necessary or not to bind party to prosecute before warrant issued ib

Previous to commitment three things required. 1. Examination of party accused, but without oath. 2. Further examination of accusers and witnesses on oath. 3. Binding over prosecutor or witnesses to next assizes, &c. 585. ii. 111

Examinations ought to be in writing without oath, and returned or certified to next gaol-delivery, &c. and being sworn by justice or clerk to be truly taken, may be given in evidence 585. ii. 52

If justice at return of warrant cannot take examination; he may *ore tenus* order officer to detain prisoner till next day, and this detainer justifiable without shewing particular cause, or any warrant *in scriptis* ib

Time of detainer must be reasonable 586. ii. 46, 121

Information of prosecutor or witnesses to be in writing on oath, and returned or certified at next sessions, G g 4

A TABLE OF THE PRINCIPAL MATTERS

- sessions, &c. and being sworn by justice or clerk, &c. to be truly taken, may be given in evidence against prisoner, if witnesses dead, or unable to travel
Page 305, 306, 586. ii. 52, 120
- Whether justices of peace of a foreign county may transmit such informations before justices, of *gaol-delivery* of proper county
 305, 306
- If justice commit or bail prisoner, he is to take surety of prosecutor to prosecute, and of witnesses to appear and give evidence, and on refusal may commit them to gaol
 585, 586, ii. 121
- Escapes within their jurisdiction
 600
- They (*nient obstante* clause in their commission) are not comprized under name of justices of *oyer* and *terminer* 686, 687. ii. 23, 44
- Where necessary to enter their adjournments
 ii. 24
- Where they may or not proceed same sessions against party indicted before them
 ii. 28, 29, 48
- They were by statute to send their indictments not determined to justices of *gaol-delivery*, whether felonies or trespasses, if party in gaol or bailed, but now unnecessary
 ii. 32, 48
- Where they may deliver prisoners by proclamation or not
 ii. 34, 46
- Have power by statute to reform *ore tenus* either pannel of grand or petit jury
 ii. 36, 155*, 156*, 265
- They cannot make out process, when indictment delivered over to justices of *gaol-delivery*
 ii. 37
- Conservators of the peace how antiently assigned
 ii. 42
- First establishment of justices of peace by 1 *E.* 3.
 ii. 42, 99
- Hearing and determining given them by 18 *E.* 3.
 ii. 42, 48, 109
- Commission of peace founded in these and other *acts*
 ii. 42
- Consisted antiently of three, now only two *assignavimus*
 ib
- Of the first and the powers it gives
 ii. *Page* 42
- So of the second
 ii. 42, 43, 44
- Distribution of powers given them
 ii. 43
- In returns or making up of records before justices of peace touching indictments or convictions, how they must be stiled
 ii. 43, 44
- Justices of peace have power by statute to hear and determine murders or manslaughter, but seldom do, or any crime oust of clergy, and why
 ii. 45, 46
- Justices of peace may take indictment of *se defendendo*
 ii. 45
- May take inquisition touching *felo de se*, if not inquired before coroners, it need not be *super visum corporis*, but is traversable
 414, 419. ii. 46
- May by statute proceed on indictment taken before former justices of peace in the county, but cannot proceed on indictment taken before commissioners of *oyer* and *terminer*, or *gaol-delivery*
 ii. 46
- But by statute indictment taken before sheriff in his *Turn*, to be delivered to them at next sessions, and they may proceed thereon ib
- Commission of *oyer* and *terminer* in the county determines second *assignavimus* of commission of peace *ad audiendum & terminandum, quod quare*
 ii. 47
- General commission of peace in county determines not power of former justice by charter, nor of justice in a city or corporation parcel of county
 ib
- Where no words of exclusion, justice of peace of county have a concurrent jurisdiction with those by charter, and so if they be justices by commission in town or city
 ib
- King, notwithstanding charter, may grant commission of peace specially in that city or county, and they will have concurrent jurisdiction with justices by charter
 ib
- But

CONTAINED IN THE TWO PARTS.

But if franchise be granted *ita quod justiciarii comitatus se non intromittant*, tho subsequent commission be granted in county at large, they have no jurisdiction in this corporation or town; but *quære*, whether indictment or session in the franchise be void, or only contempt in justices ii. Page 47, 48

Sessions private and public ii. 48

Business of private, *ale-houses*, poor, &c. ib

Public subdivided into general quarter-sessions and general sessions ii. 49

Both to be summoned by precept in *king's* name ib

In either of these sessions they may proceed in matters within their commission, as to take indictments, try felons, &c. ib

By particular *acts* some things limited to the quarter-sessions ib

When quarter-sessions to be held ii. 49, 50

Are variously held in several counties, and yet good ii. 50

In *Middlesex* regularly but two sessions, yet they may hold quarter-sessions ib

Justices to execute their authority as justices of peace within county, where justices ib

If justice live or be out of his county, he cannot by warrant fetch one out of it into county where he is ib

Whether a justice, who is such, both in *London* and *Middlesex*, may not commit one in *Middlesex* brought out of *London* and *e converso* ii. 51

Felony taken in foreign county, justice *there* may commit, examine, give oath to informers, and bind them over to give evidence, or commit them for necessity of preserving the peace; but *quære*, whether such examination and informations be evidence on arraignment of felon in proper county 305, 306, 586. ii. 51

Tho by custom of *London* justices of gaol-delivery sit at *Newgate*, which is in *London*, both for *Middlesex* and *London*, yet justices of peace for *Middlesex* sit only in that county, and justices of peace for *London* there ii.

Page 51

One is brought by *A.* before justice on suspicion of felony, if *A.* can materially testify, justice may bind him over to prosecute, and if he refuse, may commit him ii. 52

They have jurisdiction of felonies arising within the *verge* ib

In their sessions may by common law proceed to outlawry on indictments found before them, and in popular actions by statute ib

But cannot issue a *capias ut legatum*, but must return record of outlawry in *B. R.* and thence this process shall issue ib

Where justices may proceed on indictments taken in *Turns* or *Leets* or not ii. 70, 71

Justice cannot discharge one brought before him for suspicion of felony, if felony was committed, but must bail or commit ii. 93

One suspected on probable cause presumed such till contrary appear ib

Some mistakes of lord *Coke*, as that a justice of peace cannot issue a warrant before indictment, &c. refuted ii. 107 to 111

By 34 *E. 3.* their power further enlarged as to their taking persons suspected of felonies ii. 109

They are conservators of the peace and more ib

Justice may by his warrant arrest one suspected of felony, tho original suspicion not in himself, but in party praying the warrant ii. 109, 110

Fit in all cases of warrants for arresting for felony, much more for suspicion thereof, to examine on oath party requiring it touching whole matter, where-

on

A TABLE OF THE PRINCIPAL MATTERS

- on warrant demanded ii. *Page*
110, 111
- Warrant to be under hand and
seal 577. ii. 111
- Regularly ought to contain cause
ib
- If general, *to answer such matters*
as shall be objected, in discretion
of B. R. to bail or discharge
party 578. ii. 111
- It may excuse an officer in false
imprisonment, if true cause or
misdemeanor within connuance
of justice ib
- Antiently such warrants in treason
or felony held good; in warrants
of the peace and good behaviour
cause must be shewn and why
ii. 111
- Justice may make his warrant to
take one suspected by name,
but not all persons suspected;
contra of a rule in B. R. for that
purpose 580, 586, 587. ii. 105,
112
- Justice may make a warrant, as
well in case of felony as the
peace, to bring party before
himself only, or generally be-
fore any other justices, and then
officer may bring him before any
other justice of the county, and
it is not in election of party to
go before whom he pleases
582. ii. 112
- In some cases may make his war-
rant to bring him to the sessions,
tho it is better to bring him be-
fore himself, or some justice, that
party may be bailed ii. 112
- Warrant may be to bring party to
the justice to find sureties for his
appearance at the sessions, &c.
and in mean time to keep the
peace, or may be *si recusaverit*
to bring him to common gaol
ibidem moraturus quousque gratis
hoc fecerit, and yet constable
may bring him before the jus-
tice, and if he refuse there to
give sureties, he may by virtue
of first warrant bring him to
gaol, and commit without any
further warrant or *mittimus* ib
- Warrant may be in *king's* name
with *teste* of the justice, but
more usually in name of justice
ii. *Page* 113
- Whether justices out of sessions can
issue a warrant to take persons
offending against a penal law,
tho within their cognizance,
and so to bind them over to ses-
sions, or in default commit
them, and this before indict-
ment ib
- On complaint and oath of goods
stolen, and that party suspects
goods are in such a house, and
shews the cause of his suspicion,
justice may grant a warrant to
search in those suspected places
mentioned therein, and to at-
tach goods and party, in whose
custody they are found, and bring
them before him, or some other
justice to shew how he came by
them, &c. this warrantable *ni-*
ent obstante opinion of Lord Coke
ii. 113, 150
- But convenient to express that
searches be made in the day-
time, and that party suspecting
be present to give officer infor-
mation of his goods ii. 113, 114,
150
- Entry to be *per ostia aperta*; but
if doors be shut, and be refused
to be opened on demand, officer
may break open doors ii. 114,
116, 117
- Lawful clause in such warrant to
attach party, in whose custody
the goods are found ib
- If the goods stolen be not in the
house, officer is excused that
breaks open the door to search
for them on justices warrant;
but party that made suggestion
punishable, for *in eventu* it is
punishable in him ii. 151
- On return of this warrant exe-
cuted, if it appear they were
not stolen, they are to be re-
turned to the possessor; but if
it appear they were, they are
not to be delivered to the pro-
prietor, but to remain with she-
riff

CONTAINED IN THE TWO PARTS.

- riff or constable, that party may proceed by convicting offender to have restitution ii. *Page* 151
- If goods not stolen, party to be charged ib
- If stolen, but not by him, but another that sold or delivered them to him, and prisoner appear to be ignorant that they were stolen, he may be discharged as an offender, and bound over to give evidence as a witness against him that sold them ii. 151, 152
- If he knew they were stolen, fit to bind him over to answer the felony ii. 152
- These warrants are judicial *acts*, and must be granted on examination of the fact ii. 150
- To whom to be directed, and what the purport thereof ib
- General warrant to search all places, whereof party and officer have suspicion, tho usual, not safe ii. 114, 150
- Warrant ought to mention name of party to be attached, and must not be left with blanks to be filled up by party, such warrant void 577. ii. 114
- If there be a riot or breach of the peace in presence of a justice, he may arrest the rioters, or command any officer, or others *ore tenus*, without warrant to arrest them, and they by virtue thereof may arrest *flagrante crimine* in absence of the justice ib
- If a riot be committed, and rioters dispersed by coming of the justice, and they be suspected probably to meet again, or threaten it, tho constables may *ex officio* suppress the riot, and raise *posse* of vill to do it; yet a justice may deliver a special warrant to arrest the rioters, if they re-assemble, tho there be no particular persons named in warrant; he may even authorize them by word ii. 114, 115
- Justice must either discharge or commit, or bail one arrested for felony brought to him ii. *Page* 120
- If one be brought before a justice expressly charged with felony by oath, justice cannot discharge him, but must bail or commit ii. 121
- If charged with suspicion only, yet if no felony proved to be committed, or if fact be no felony, justice may discharge him as to felony; tho if a trespass, he may bind him over for it ib
- If one be killed by another, tho *per infortunium*, or *se defendendo*, (which is not properly felony), or in assault on an officer, (which is no felony at all) justice ought not to discharge him, therefore he must be committed, or at least bailed ib
- They cannot proceed on an indictment taken before superior judges tho otherwise the cause might be within their cognizance ii. 133
- They, as to their *venire facias*, agree with justices of *oyer and terminer*, and may indict, arraign and try same day in cases of felony ii. 261, 262
- By statute proceedings before them not discontinued by new commission ii. 401, 405
- Vide Arrest, Bail, Commitment, &c.

Justification.

- Where warden of the *Fleet* may justify imprisonment by virtue of an order of *Chancery* ii. 122
- In treason or felony there can be no justification, as *se defendendo*, &c. ii. 258
- But on *not guilty* prisoner shall have advantage of all such defenses, and where matter appears not to be felony, he on *not guilty* pleaded, may be acquitted

A TABLE OF THE PRINCIPAL MATTERS

acquitted ii. Page 258, 259,
303, 304
*Where, and how arrest on suspicion
may be justified, or not. Vide
Arrest.*
*Where one may justify breaking open
doors, or not. Vide Arrest, Hue
and Cry, Justice of Peace.*
*Where one may justify beating a tres-
passer, come to take his goods, or
endeavouring to enter on his pos-
session, or not. Vide Homicide.*

King.

PRESUMED that he neither
will, nor can do any wrong,
and therefore, if he command
an unlawful *act* to be done, the
instrument is not thereby in-
demnified, but punishable 43, 44
Tho he is not under the *coercive*,
yet in many cases his commands
are under the *directive* power
of the law, which makes the
act itself invalid, if unlawful
44, 127

In time of peace, if two men com-
bat together at barriers, &c.
and one kill the other, it is ho-
micide; but if by the *king's*
command, it is said to be no
felony 44

By descent of crown *king* invested
with the right of sovereignty
61, 101

Supremacy of the *king* in matters
ecclesiastical a most unquestion-
able right 75

Weight, allay and extrinsic value
of coin *inter jura majestatis* 191
192, 204

Clause in 28 H. 8. enabling him
to dispose of lands by will was
necessary, for otherwise he could
not have done it by will 278

But without this *act* he had power
to dispose of lands belonging to
the crown or *duchy* by letters
patents under these respective
seals 278

Where there are three powers, as
of justices of *oyer* and *terminer*,

gaol-delivery, and the peace,
and record is made up by all
these powers, the best shall be
taken for the *king* ii. Page 34
Office of coroners being by elec-
tion is not determined by *king's*
demise ii. 55
King cannot arrest in person, or
imprison or command another
so to do, but by writ, &c.

ii. 131
King's title being of record must
be avoided by record ii. 205
If *king* sit in person in *B. R.* he
cannot pronounce judgment in
treason, for, as he cannot be a
witness, so he cannot be a judge
in propria causa ib

Where *king's* testimony allowed,
or not, and how *king* to exhibit
his testimony ii. 282

Who *king*, queen, prince, &c.
within 25 E. 3. *de proditionibus*
Vide Treason.

Vide Allegiance, Forfeiture,
Grant, &c.

King's Bench.

Marshal immediate officer to exe-
cute judgment of death 464,
502. ii. 5

And for that purpose is mentioned
in judgments of treason ii. 411

There may be a mandate to the
sheriff to assist ii. 5

Chief Justice or any other judge
of *B. R.* may issue a warrant
into any county, for taking or
bringing before him a felon, or
one suspected of felony into any
county in *England* or *Wales*
578. ii. 5, 6, 198

They are conservators of the peace
through all *England*, more than
justices of *oyer* and *terminer*
578. ii. 5

To avoid trouble of bringing up of-
fenders, before whom their war-
rants are made returnable, and
to whom directed 578. ii. 6

How their warrants ought to run
in cases of surety of the peace,
&c.

CONTAINED IN THE TWO PARTS.

- Ec.* against one in another county, than where they are
Page 578. ii. 5, 6
- Tipstaves the marshal's deputies; each judge hath one 586. ii. 6
- A judge of *B. R.* may order an arrest *ore tenus*, without expressing cause ib
- Where *B. R.* hath made an order to take persons that party grieved suspects, and bring them into court 586, 587
- B. R.* swear a grand inquest, and take indictments every term 651. ii. 3
- Highest ordinary court of justice next to parliament ii. 2, 159
- It is more than a court in *Eyre*; where it sits, it is sovereign court of *gaol-delivery*, and *oyer and terminer*; the judges are *justiciarii ordinarii* ii. 4, 22
- It is the center of all subordinate jurisdictions, especially in matters capital ii. 401
- It hath two kinds of jurisdiction, the plea and crown-side ii. 2
- Ancient and modern way of keeping and titling the records ii. 23
- Grand inquest to present all matters criminal within *com. Middlesex*, and then *B. R.* proceeds on indictment so taken ii. 3
- Where *B. R.* proceed on offense committed in same county, they may proceed *de die in diem*, fifteen days betwixt *teste* and return of *venire fac.* not required; otherwise if they proceed on a cause removed by *certiorari*, except on indictment taken by justices of peace of county, where *B. R.* sits ii. 3, 260
- At common law record before filing remandable, afterwards not ii. 3
- But if issue joined transcript may be sent down to be tried at *nisi prius*; but original record remains in *B. R.* ib
- By 6 *H. 8.* court may remand indictments of felony removed hither, and bodies of prisoners to the justices of peace, &c. where felony committed ii. *Page* 3, 4, 41
- Coming of *B. R.* into any county suspends (not supercedes) session of commission of *gaol-delivery*, *oyer and terminer*, and the peace ii. 4
- Where special commissioners of *oyer and terminer* may sit in term in same county, where *B. R.* sits, but *B. R.* must adjourn ib
- Tho some *acts* limit proceedings in criminal causes to commissioners of *oyer and terminer*, *B. R.* may proceed upon them; but justices of peace cannot ib
- One attain, and record removed, it may award execution ib
- It is sovereign coroner of *England*, and may take appeals of death, &c. by bill ii. 5
- Chief Justice chief coroner *virtute officii* ii. 53
- Felonies within *king's* palace, *nient obstante*, 33 *H. 8.* triable in *B. R. contra* where felony created *de novo* with special form of proceedings ib
- By custom may *ore tenus* command a tipstaff to apprehend for misdemeanors ii. 6
- Chief Justice not the *Justiciarius Angliæ* ib
- The immense authority of the ancient *Justiciarius Angliæ* 106. ii. 6
- Chief Justice created by writ ii. 6
- B. R.* had antiently, in cases of felonies and treasons done on the narrow seas, out of bodies counties, a concurrent jurisdiction with the admiralty ii. 12, 13
- B. R.* comprised in *acts* giving power to justices of *oyer and terminer* ii. 22
- On trial of felons in *B. R.* if prisoner challenge twenty peremptorily, so that those remaining of the pannel be not sufficient; *tales* to be granted by precept returnable, as the case shall require ii. 56
- Clerks*

A TABLE OF THE PRINCIPAL MATTERS

Clerks of the crown, assise and peace to certify hither names of all persons outlawed, attaind and convict ii. Page 36, 37

One slain in open rebellion, Chief Justice on view of body may make a record thereof, and send it into B. R. and thereon party shall forfeit his goods, but not lands ii. 53

Clerk of crown, coroner for B. R. to view body of prisoner dying in king's bench ii. 58

Have not only power to issue writs on indictments and appeals before them; but also may by order command sheriff of county, where they sit, or their marshal to take felons or disturbers of peace, and bring them before the court ii. 105

Custom of the court part of the law of land ib

Where on information on oath of breach of the peace, and a design by persons, whose names could not be known, to commit a riot, B. R. hath made an order to the sheriff to bring before them such as should be probably suspected to be parties therein 586, 587. ii. 105

Where B. R. may give judgment on record of conviction removed before them, &c. Vide Judgment.

Vide Certiorari Court, Execution and Reprieve, Bail-delivery, Habeas Corpus, Justice of Assise, Justice of Peace, Outlawry, Writ and Terminer, Process, &c.

Larciny.

DIVIDED into simple and violent, simple larciny subdivided into grand and petit 503

Grand and petit larciny described 530

Same in nature, but different in degree of punishment ib

Definition of larciny 504

How the indictment must be Page 504

What are the ingredients in this crime ib

What shall be said a taking 505, 506

A. lends his horse to B. who rides away with him no felony 505

If a man seeing a horse in pasture of owner, having a mind to steal him, obtains a replevin, and thereby hath the horse delivered, this a felonious taking 507

A. steals horse of B. and afterwards delivers it to C. who is no party to first stealing, and C. rides away with it *animo furandi*, larciny ib

But if A. feloniously take the horse of B. and after C. steal him from A. C. is a felon to both, and C. may be appealed or indicted as of a felonious taking from B. for by the theft B. lost not property, nor in law possession of his horse ib

Where a carrier shall be said to be guilty of a felonious taking of goods delivered to him or not 504, 505

Carrying the goods to the place of delivery, and taking them afterwards, a new taking 505

Before 21 H. 8. if a servant had carried away goods delivered to him by his master *animo furandi*, it had not been felony 667

By this act made felony, if of value of forty shillings; offender intitled to clergy, [but where ousted by 12 Annæ] ib

An Apprentice or servant under eighteen exempt from felony enacted *de novo* by 21 H. 8. [how far altered by 12 Annæ]. ib

Yet it leaves him in same condition, as to any felony at common law, as if he was not excepted 668

And therefore, if my butler or shepherd under eighteen, or if my apprentice take away my goods feloniously, without my actual delivery, tho under value

CONTAINED IN THE TWO PARTS.

- lue of 40s. he is indictable of felony at common law *Page* 506, 667, 668
- If a man deliver a bond to his servant, or goods to sell, and he sells them and receives the money, and carries it away *animo furandi*, not felony 668
- Whether delivery of master's goods by one servant to another, in master's absence, may be said to be by the master; delivery of the goods by master's wife within the *act* ib
- A servant receives his master's rents, and *animo furandi* carries them away, not felony ib
- A. delivers the key of his chamber to B. who unlocks the chamber, and takes A.'s goods *animo furandi*, felony ib
- One that hath a bare charge of goods, tho not possession, may be guilty of felony at common-law; as a butler that hath charge of plate, a shepherd of sheep, the like of him that hath a bare special use, as the guest, that hath plate set before him 506, 667, 668
- If A. by false tokens receives money of B. and carries it away, no felony 503
- Master delivers silver to servant to change into gold, or leather to make shoes, and he runs away with it felony 668
- Finding a purse in the highway, and denying or secreting it, not felony 506
- Taking treasure-trove, wrecks, waifs and strays [before seizure] no felony, but party must believe them to be such ib
- Where a man's goods are in such a place, where ordinarily they are, or may lawfully be placed, and a person takes them *animo furandi*, felony ib
- If a sheep of A. stray from his flock into the flock of B. and B. drives it along with his flock, or by mistake shears it, no felony; but otherwise, if he knows it to be another's, and marks it with his mark, this evidence of felony *Page* 507
- A servant finds his master's purse in his corn-mow, and takes part, if he knew his master laid it there, felony ib
- If A. steals goods in the county of B. and carries them into county of C. he may be indicted for larciny in county of C. but can only be indicted of robbery in county of B. 507, 508
- Where continuance of the asportation is a new caption 507
- A. takes the horse of B. and before he gets out of the close is apprehended, larciny 508
- If a guest takes sheets off the bed feloniously, and carry them out of his chamber into the hall, felony ib
- A. came into the dwelling-house of B. where nobody was, and broke open a chest, and took out goods to the value of 5s. and laid them on the floor, and was taken before he could remove them, he being indicted on 39 *Eliz.* was ousted of clergy ib
- If A. hath his keys tied to the strings of his purse, B. a cutpurse, takes A.'s purse with money in it out of his pocket, but the keys, which were tied to the strings of his purse, hang in his pocket, A. takes B. with his purse in his hand, but the strings hang to his pocket by the keys, no felony; for *licet cepit, non asportavit* ib
- Where there is a pretense of title, regularly no felony; but yet it may be a trick to colour a felony 509
- What circumstances are evidence of a felonious intent 508, 509
- If A. takes away goods of B. openly (otherwise than by robbery) this evidence only of a trespass ib
- A. leaves his harrow in the field, B. having land in the same use

A TABLE OF THE PRINCIPAL MATTERS

- seth the harrow, and returns it to the place where it was, no felony, but trespass Page 509
- If *A.* and *B.* being neighbours, and *A.* having a horse on the common, and *B.* having cattle there that he cannot readily find, takes up the horse of *A.* and rides about to find his cattle, and having done turns off the horse again in the common, no felony, but at most a trespass ib
- So if my servant without my privacy take my horse, and ride a few miles and return, no felony; but *contra*, if in his journey he sell it ib
- Of what things larciny may be committed or not 509, 510
- Of creatures of a base nature, as dogs, bears, &c. or their whelps there can be no felony; but of *hawks* reclaimed it may be 512
- Larciny may be committed of young *hawks* in the nest, but not of their eggs; taker of eggs, how punished 511
- Larciny cannot be committed of wild swans, or their young; but *contra*, if they be made tame, or if they be marked, or pinioned; but if marked and yet flying swans that range abroad out of precincts of the owner, no felony to kill them ib
- On indictment for stealing goods of *B.* who is proved to be a *feme covert*, party may be acquitted, so if it appear that the supposed owner had neither interest nor possession in the goods, but he ought to be indicted *de novo* for goods of husband or true owner 513
- Where a man may commit felony of the goods, wherein he hath a property ib
- Jointenants or tenants in common of a horse, one cannot be a felon to the other ib
- A.* takes away the trees of *B.* and cuts them into boards, *B.* may take them away, and not felony; and so of cloth made into a doublet ib
- If *A.* take away the hay and corn of *B.* and mingle it with his own stock, or take the cloth of *B.* and embroider it, *B.* may take the whole heap or garment, and embroidery also, and be not guilty even of trespass Page 513
- Yet if *A.* bail goods to *B.* and steal them from him to charge him with an action, felony ib
- Wife cannot commit felony of her husband's goods; and therefore, if she take and deliver them to *B.* who knowingly carries them away, no felony in *B.* 513, 514
- If husband deliver goods to *B.* and wife take them feloniously from *B.* felony 514
- Taking away another man's wife against her will *cum bonis viri*, felony by statute ib
- Servants in the house imbezzeling their master's goods after his decease by 33 *H.* 6. if they appear not on proclamation, attaint of felony 515
- To steal shroud of a person buried, felony ib
- Larciny from the person *clàm & secretè* by 8 *Eliz.* except under value of 12*d.* principals ousted of clergy, accessaries not 531
- Horse-stealers ousted of clergy by 1 *E.* 6. & 2 & 3 *E.* 6. but accessaries not 529
- Petit larciny, felony 530
- No accessaries either *before* or *after* ib
- If *A.* steal 12*d.* at one time, and *B.* 12*d.* at another, so that the *acts* were several, tho the goods of the same person; petit larciny in each ib
- If *A.* be indicted of larciny of goods to the value of 5*s.* petit jury may find it of value of 12*d.* or under ib
- If *A.* steal from *B.* to value of 6*d.* and then to value of 8*d.* it is grand larciny, if put together in one indictment 531
- If goods be stolen at several times from several persons, and each apart under value, several petit larcinies,

CONTAINED IN THE TWO PARTS.

larcinies, tho in one indictment

Page 531

But *contra*, if such goods of several persons were in one bundle; or on one table, or in one shop, grand larciny ib

If a man steal a horse not above value of 12*d.* or break a house in the day time, and steal goods only of that value, the owner &c. not put in fear, this but petit larciny, notwithstanding 5 & 6 E. 6. for that statute only oults clergy, where offense capital, as grand larciny ib

Taking from person without putting in fear or violence is not robbery, but larciny 534

Where words of menace are used after the taking, only larciny ib
For larciny from the house or special burglaries. Vide Burglary.

Vide Clergy, County, Felony by Statute, Indictment, &c.

Laws.

Laws of England.

More determinate, than foreign laws, and leave as little as may be *ad arbitrium judicis* 13

This law allows not the judge to change the punishments it inflicts 19

Always affects certainty 22

Hath no dependance on the civil law 16

Is excellently adapted to the conveniences of *English* government, and full of excellent reasons 489

Common law in and after E. 3. received a greater perfection, not by change thereof, for that could not be but by statute; but men grew to greater learning and experience, and rectified mistakes of former ages and judgments 24, 25

The king and his laws are *vindices injuriarum* 481

Vol. II.

Natural Law.

If one be violently assaulted, and cannot otherwise save his own life, law of nature permits him in his own defence to kill assailant Page 51

Nature prompts all men in whatsoever condition to preserve themselves, which cannot be without society 432

Law of nature makes a man his own protector *cum debito moderamine inculpatæ tutelæ* 51

Positive Law.

Penalties, as to their degrees and applications, are *juris positivi* & *non naturalis* 13

Lex talionis, except in murder, is purely *juris positivi*, and the Jews made a commutation of it 14

The antient divine Law, the Mo- saic, Attic, and Roman Laws touching Homicide

By the antientest divine law homicide was capital 2

Delivery of a man into his neighbour's hand, explained ib

Who were intitled, or not, by the Mosaic law to the privileges of places and cities of refuge ib

Killing a thief found breaking up in the night, not capital; but *contra* in the day 488

The judicial laws made no difference in punishment of homicide on malice forethought, and on a sudden falling out, both capital; but they extended not that rigour to casual homicide, but yet were so strict, as to suffer avenger of blood to kill such manslayer before he got to city of refuge 477

There is not amongst these laws any one which is express touching homicide *se defendendo*, but
H h custom

A TABLE OF THE PRINCIPAL MATTERS

custom of the *Jews*, and interpretation of their doctors exempted a fact so circumstanced from capital punishment *Page* 4
 If a woman quick with child took, or another gave her a potion to cause *abortion*, or one struck her, whereby *fœtus* was killed, by the *judicial laws* it was capital 433

Many of the *Attic* laws touching *homicide* collected by *Petit* cited; between which and the *judicial laws* there is a great analogy 4 to 7

Wherein the *Roman* laws differ from, and agree with them 6, 7, 488

The Attic, Jewish, Roman and antient English Laws touching Theft.

By *Jewish* law theft not capital, tho accompanied with burglary, save that *plagium* was capital, and that by the civil constitution of that state, punishment of theft was in some cases enhanced even to death 9

Of the law of restitution in case of *theft* 9, 503

Wherein the *Attic* and *Jewish* laws agree and differ with regard to theft 9

The *Roman* laws concerning punishment of *theft* 11, 503

The *antient laws of England* touching the same 11, 12, 503

Notwithstanding opinion of *school-men*, &c. policy of most countries hath made it capital 12, 13

Among the *Jews* lawful in case of hunger to pull the ears of standing corn and eat, and for one, that passed thro a vineyard, &c. to gather and eat, without carrying away 55

Punishments inflicted by the Laws of several Countries.

What the rule to be observed in ordaining punishments 1

How divided *Page* 1
 The penalties instituted by God, amongst the *Jews*, on breach of their laws, are the best pattern for institution of punishments, tho they conclude not other states 2

Instances of various kinds of punishments inflicted by laws of several countries, especially in *homicide* and *theft* 2 to 15

The degrees and orders of the *Roman* punishments 11

The end and design of punishments 14

By *Jewish* law thief had no exemption from punishment by reason of *necessity* 55

Law of Nations.

Allows a sovereign prince to begin hostilities with another designing a war against him; but *contra* between subjects of same prince, there one cannot kill another by way of prevention 52

Where the *king* may deal with a *merchant stranger*, who commits treason, either as an *alien enemy* by the law of nations, or as a traitor by the law of *England* 94

Vide *Alligance, Ambassador, Marque or Reprisal, War.*

Civil Law.

Civil laws wise and well composed laws, of great use to be known, tho not to be made the rules of our *English* laws; no stress to be laid on them, either for discovery, or exposition of *English* laws, farther than by customs of *England* or statutes they are here admitted 16

Where *civil law* lays a penalty on tutor for offense done by infant *incapax doli* 19

Instances of *artificial accessions* by *adjunction, commixtion* and *specification*

CONTAINED IN THE TWO PARTS.

cification in the common law
[the same as are in the civil
law] Page 513

Where party according to civil
law may be examined, as a sup-
plemental proof ii. 285

How the civil law distinguisheth the
age of man for several purposes,
and wherein the civil and common
law agree and differ. Vide In-
fant.

By the antient Jewish law he, that
was but a day above thirteen
years, was adjudged *in virili statu*,
but not if under that age 18

Canon Law.

Canons or decretals of popes, or of
provincial councils, or imperial
constitutions never bound in Eng-
land, farther than by statutes or
common usage they were re-
ceived 399. ii. 325, 329, 330

By canon laws nuns exempt from
temporal jurisdiction ii. 328

Vide Clergy, Religion.

Rhodian Law.

If common provision for ship's
company fail, master may under
certain temperaments break
open private chests of mariners
or passengers, and distribute
private provision for preserva-
tion of ship's company 55

It is a received custom, if a ship
wants necessaries, and inhabi-
tants of continent will not fur-
nish them for money, they may
by *usage of the sea* and *nations*
take provisions by force, ma-
king inhabitants reasonable sa-
tisfaction ib

But *contra*, where this done by
English mariners on English shore,
where there is one common ma-
gistrate, because capable of
other remedy 56

For maritime and martial laws.
Vide Admiralty, Constable
and Marshal.

Leet.

Escape presentable there, but com-
mon fine or amercement cannot
be set there, but it may be re-
moved in B. R. and there a-
mercement may be set Page 603

Felony newly created not inquir-
able there, unless specially li-
mited to them, but *contra* of fe-
lonies at common law 632.

ii. 71

Cannot hold pleas of the crown
ii. 69, 71

Hath in effect same jurisdiction
with the Turn ii. 71

They cannot try felonies presented
there, but must send such pre-
sentments before justices of *gaol-*
delivery, or they must be re-
moved into B. R. that process
may be made on them to out-
lawry ib

Vide Sheriff.

Local. Vide County, Indict-
ment, Trial.

London.

By charter mayor to be in com-
mission of *oyer and terminer*, but
not on indictment grounded on
8 H. 6. against *avoiding records*
562

He is also of the *quorum* in com-
missions of *gaol-delivery* by char-
ter ii. 32

Whether justice both in London
and Middlesex may not commit
one in Middlesex brought out of
London, and *e converso* ii. 51

Custom of London enables justices
of *gaol-delivery* to sit at New-
gate, which is in London, both
for Middlesex and London; but
justices of peace of the said
counties sit in their respective
counties only ib

Mayor by charter coroner ii. 53

A TABLE OF THE PRINCIPAL MATTERS

Lunatic. Vide Ideot. &c.

Madman. Vide Ideot, &c.

Mainoubre. Vide Arraignment.

Mainprize. Vide Bail.

Malum prohibitum.

BEING only under a penalty will not inhanse effect of crime beyond its nature, as if one unqualified to keep a gun shoots at a bird, and casually kills a man, it is only chance-medley Page 475, 476

Manslaughter. Vide Murder and Manslaughter.

Mariner.

Whether lawful to impress them 678, 679

Vide Admiralty, Felony by Statute, Rhodian Law under title Laws.

Market-obert. Vide Restitution.

Marque, or Reprisal.

A species of war 162
Particular, granted to some particular men on certain occasions to right themselves. (Vide 4 H. 5.) ib

General, tho it hath the effect of war, is not a regular war, and wherein it differs ib

Martial Law. Vide Constable and Marshal.

Marriage.

A forcible marriage, tho voidable, is a marriage *de facto* 660, 661
Vide Forcible Marriage, Polygamy.

Master and Servant.

Command of master excuseth not servant in treason or felony Page 44, 516

Possession of servant is possession of master 668

Menial servant, how described by *Bracton* ii. 75

For homicide in servant *defendendo the master*, and *è converso*.
Vide Homicide.

Maxims.

Malitia supplet ætatem 26

Ignorantia eorum, quæ quis scire tenetur, non excusat 42

Expressum facit cessare tacitum 235, 614

Quòd dubitas, nefeceris, especially in cases of life 300, 509

Stabit præsumptio, donec probetur in contrarium 516

A man shall not take advantage of his own wrong to gain the favourable interpretation of law 482

Nor can he apportion his own wrong and breach of duty 597

De minimis non curat lex 603.
ii. 154

Fictio juris intenta ad unum 630

Nullum tempus occurrit regi 632

[Unicuique licet] renunciare juri pro se introducto ii. 224

Tutius semper est errare in acquietando, quàm in puniendo, ex parte misericordiæ, quàm ex parte justitiæ ii. 290

Tutius erratur ex parte mitiori ii. 305

Frustra legis auxilium quærit, qui in legem committit ii. 386

Militia.

By what *acts* declared to be the right of the crown 130

Misnomer. Vide Abatement.

Misc.

CONTAINED IN THE TWO PARTS.

Misprision.

Whether a wife can be guilty of misprision of treason committed by husband; *quære* Page 48

Two witnesses requisite both on indictment and trial of misprision of treason 300

A physician, &c. ministers help to a sick traitor, tho he know him to be such, this makes physician, &c. not incur the guilt of treason; but it will be misprision of treason, if he know it, and discover it not 332

Misprision of treason at common law defined 371

By statutes concealment of treason shall be deemed only misprision of treason ib

By 1 Mar. enacted, that nothing be adjudged to be misprision of treason, but what is contained in 25 E. 3. and tho that *act* do not make or declare misprision of treason, yet it virtually doth it by declaring and enacting what is treason 371, 372, 375

Uttering false money knowingly not misprision of treason, without knowing the counterfeiter, and concealing it 372, 373

Act *puisne* to 1 Mar. makes a new treason, concealment of such treason, misprision thereof 373 375

Concealment of treason or felony by common law or statute is a misprision of the respective offense 374, 618, 708

Every treason is a misprision thereof, and more, and he, who is assisting to treason, may be indicted of misprision only 374

Every felony includes misprision thereof, and offender may be indicted of the latter only 652 708

Misprision remains so long, as the *act* making treason continues, and so of misprision of felony enacted by statute 375

Beside consequential, there are substantive misprisions, as by

14 Eliz. against forging foreign coin not current, 13 Eliz. against concealing the publishing by others of bulls of absolution, and 23 Eliz. against aiders and maintainers of persons absolving or withdrawing the subjects from their obedience, or persuading them from the established religion, &c.

Page 376, 377

Where felony by statute limited to a special jurisdiction, and manner of trial, misprision of it triable by common jury and general commissioners of *oyer* and *terminer* 653

Where upon commission of felony looking on without using means to take the felon is a misprision of felony 439, 448, 449. 593. ii. 75, 76

Mittimus.

Vide Arrest, Commitment, Justice of Peace.

For mittimus and transcript of record. Vide Certiorari, Pleas.

Murder and Manslaughter.

If one *ex intentione* do an unlawful *act* tending to bodily hurt of another, as by striking him, tho not with intent to kill him, but his death happens within year and day, or if he strikes at one, and missing him kills another, whom he did not intend, it is felony and homicide, and not *casualty*, or *per infortunium*; so it is, if he do an unlawful *act*, tho not intending bodily harm of any man, as if he throw a stone at another's horse, and it hits a man and kills him 39, 440 472

Want of due diligence and inspection may make that manslaughter, which otherwise would be only chance-medley 475, 476

Homicide justifiable by statute *de malefactoribus in parcis* not to

A TABLE OF THE PRINCIPAL MATTERS

- be committed on any former malice, what required to justify such homicide *Page* 491
- In time of peace, if two combat together at barriers, or for trial of skill, if one kill the other, it is homicide; but *contra* if by *king's* command 44, 473
- 33 *H. 8.* as to trial in a foreign county of murder, now in force, tho not as to *treason* 283, 374
- Murder and homicide defined 425, 449, 450, 466
- Murdrum*, what it antiently imported 447, 448
- Stroke without death, nor death without stroke, or other violence, makes not the homicide 426
- To what intents murder or manslaughter relates to the stroke, or other cause of death, and to what purposes it relates to the death only 426, 427, 428
- If a mortal stroke [before 2 *G. 2.*] had been given on the *high sea*, and party had come to *England* and died, neither admiral nor common law had jurisdiction 426
- By 2 & 3 *E. 6.* the justices or coroner of the county where party dies, shall inquire and proceed, as if stroke had been in same county 427
- By same *act* indictment and trial of accessaries shall be in county, where accessory *ib*
- No murder till party dies *ib*
- If one gives another a stroke, not so mortal, but that with good care he might be cured, if he dies of the wound within year and day, homicide or murder according to the case 428
- But if it be not mortal, but with ill application party dies, if it appear clearly, that the medicine and not wound was cause of his death not homicide *ib*
- If not in itself mortal, if either for want of applications or neglect thereof, it turns to a *gangrene*, or fever, which proves immediate cause of his death, murder, or manslaughter; wound *causa causati* *ib*
- One gives a wound to another sick of a disease, which by course of nature might end his life within half a year, it hastens his end by irritating the disease, murder or manslaughter *Page* 428
- If a man by working on the fancy of another, or by harsh usage put another into such a passion of grief or fear, that party dies suddenly, or contracts a mortal disease, tho murder *before God*, yet not so *in foro humano* 429
- Physician or surgeon gives a potion with a good intent, it kills patient, no homicide; neither if he be no licensed surgeon or physician 429, 430
- One gives a pregnant woman a potion to destroy the child, it kills her, murder 429
- Owner of a beast used to hurt people not knowing it, dispensable 430
- Knowing it, and not keeping him up from doing hurt, how punishable 430, 431
- Tho owner have no notice, if it be a beast *feræ naturæ*, as a lion, &c. if he gets loose and doth harm, owner liable to damages, for he must at his peril keep him up from doing hurt 430
- If owner, knowing that his ox is used to hurt people, use due diligence to keep him up, yet ox breaks loose, and kills a man, no felony 431
- If through negligence beast goes abroad after warning of his condition, manslaughter *ib*
- If owner purposely let him loose to do mischief, or with a design only to fright people and make sport, and it kills a man, murder *ib*
- Laying poison to kill rats, a man casually is poisoned, no felony *ib*
- But if to kill *B.* and *C.* by mistake takes it and is poisoned, murder; so in all cases where malice intended to one *egreditur personam* 436, 441, 442, 467
- Tho

CONTAINED IN THE TWO PARTS.

- The party take poison by the persuasion, but in absence of another, persuader is principal in the murder *Page* 436, 441, 442, 467
- A.* gives poison to *B.* intending to poison him, *B.* ignorantly gives it to another, who dies of it, murder in *A.* but *B.* not guilty 436
- A.* gives purging comfits to *B.* to make sport only, he dies of it, manslaughter ib
- Various instances of killing, as by exposing sick persons or infants, &c. 431, 432
- A man infected with the plague goes abroad with intent to infect another, who is thereby infected and dies, whether murder 432
- If a woman quick with child takes or another gives her a potion to cause abortion, or one strikes her, whereby child within her is killed, it is a great misprision, but no felony; so it is if such child were born alive and baptized, and after die of the stroke given to the mother, not homicide [*sed quære*]. 433
- One counsels her before the birth to destroy it, and after child is born, and the woman destroys it accordingly, she guilty of murder and procurer accessory ib
- Killing one attaint of felony, otherwise than in execution of the sentence by lawful officer is murder, or manslaughter, according to the case 497
- Homicide to kill one outlawed of felony ib
- Sheriff beheads one condemned to be hanged, murder 454, 466, 501
- 5 *Eliz.* makes killing a man attaint in a *præmunire*, murder ib
- Killing an *alien enemy* murder, unless *flagrante bello* ib
- If there be an actual forcing a man, as if *A.* by force take the arm of *B.* and the weapon in his hand, and therewith mortally stabs *C.* murder in *A.* but *B.* not guilty *Page* 434
- But otherwise of a moral force, as by duress, &c. ib
- If *A.* command *B.* to beat *C.* and he beat him to death, murder in *B.* and in *A.* also, if present; if absent, accessory 435, 440
- A.* indicted of murder, and *B.* as accessory *before* by procurement, *A.* is found guilty only of manslaughter, *B.* shall be discharged 437
- All present and assisting to murder, principals ib
- If *A.* is indicted, as having given mortal stroke, and *B.* and *C.* as present and assisting, and on evidence it appears that *B.* gave the stroke, and *A.* and *C.* were only aiding and assisting, it maintains indictment 437, 438
- If *A.* lies in wait to kill *B.* and *C.* servant of *A.* being present takes part with his master, and servant or master kills *B.* murder in *A.* only, homicide in *C.* 437
- A.* having malice against *D.* master of *B.* by mistake assaults and kills *B.* the servant, or *B.* comes in aid of his master, and *A.* kills him, murder in *A.* ib
- On indictment of murder, the party acquit thereof, and convict of manslaughter, he shall receive judgment as if he had been indicted of manslaughter, for offense in substance the same 499, 450, 466
- If *A.* and *B.* and *C.* and divers others be engaged in an affray together, and *D.* the constable comes to appease it, and *A.* knowing him to be such kills him, and *B.* and *C.* not knowing it comes in, and finding *A.* and *D.* struggling, assist and abet *A.* in killing the constable, murder in *A.* but manslaughter in *B.* and *C.* but others of them, that did not know him, or abet, are not guilty 446
- An abettor of murder and homicide must be present and assisting ib
- H h 4 One

A TABLE OF THE PRINCIPAL MATTERS

One procuring or abetting and absent, only accessory in murder Page 439

If present, and not aiding and abetting to the felony, neither principal nor accessory, but looking on without using means to take felon, a misprision 439, 448, 449, 593. ii. 75, 76

Divers of same party come to make an affray, &c. and come into one house, all are said to be present, tho in another room 439

So are they said to be, if they come into one park, tho at a distance from each other 465

One ready to aid, tho but a looker on, is a principal 439, 441

Divers come with one assent *male faire*, as to rob, kill, beat, or do any trespass, and in doing it one kills a man, all principals 440, 441, 463

If *A.* come in company with *B.* to beat *C.* and *B.* beat him till he die, *A.* is a principal 472

A. and *B.* combat, *C.* comes to part them, *A.* kills *C.* murder in *A.* and *per ascuns*, in both; but if falling out on a sudden, then only manslaughter in him that killed him 441, 442

A. with above thirty entered with force on a manor-house, and ousted *B.* and his family; twenty others on part of *B.* three days after in the night came with weapons in order to re-enter, and one of them cast fire into a thatcht house adjoining to the house; whereof one in the house shot off a gun, and killed one of the party of *B.* manslaughter 440, 441

A man seisseth goods of an *alien enemy*, and carries them to his house; a stranger under pretence of being deputy-admiral, with a great multitude came with force to the house, and at the gate made assault upon those within, a woman issuing out, without any weapon, was killed by a servant, who came to

take the goods, by throwing a stone at another in the gate; *per ascuns*; if the woman came in defense of master of the house, it was murder in vice-admiral and his company; *per auters* no malice against the woman, and murder shall not be extended farther than intended; *per tous*, manslaughter Page 441, 442

Divers come to commit a riotous, unlawful *aſt*, if in pursuit thereof one commit murder or manslaughter, all of that party that committed the disorder are guilty 442, 443, 463

But in that case it must be intended, when one of same party commits murder, &c. on one of the other party, or on those, that come to appease, or part them, or by law to disperse them 443

A. and *B.* fight upon premeditation, *A.* takes *C.* for his second, *B.* takes *D.* *A.* kills *B.* murder in *C.* formerly held to be murder in *D.* also; but it seems otherwise 443, 452, 453

If one have no particular malice against any individual man, but comes with a general resolution against all persons, if *aſt* be unlawful, and death ensue, it is murder; as if it be to commit a riot, or enter into a park 444, 445, 466

A. and divers others come together to commit a riot, and in their march *A.* meets with *D.* with whom he had a former quarrel, or by reason of some collateral provocation given by *D.* to *A.* *A.* kills him without any abetting by his company, they not principals in the murder or manslaughter 443, 444

Where many came to commit a disseisin, and one killed, all the company arraigned as principals, and condemned; but it seemeth to be only manslaughter 444

If many come together on an unlawful design, and one of the company

CONTAINED IN THE TWO PARTS.

- company kills one of the adverse party without abetment of the rest to the homicide, none guilty, but those that gave the stroke, or actually abetted *Page 444*
- Many come to remove a nuisance committed in the highway, they are opposed by divers others, one of the former party strikes one of the latter suddenly, and kills him without abetment of the rest, he who strikes is guilty of manslaughter, rest *not guilty* without abetment *ib*
- But if it had been no nuisance, rest had been guilty *444, 445*
- If *A.* hath good title to his house, or be in possession for three years (in which case he may detain by force by 8 *H. 6.*) if any person come to rob or kill him, and he shoot and kill him, no felony, nor forfeits he his goods, as in case of homicide *se defendendo* *445*
- But if *A.* come to enter with force [being ousted], and in order thereto shoot at his house, and *B.* the possessor having other company in his house shoots and kills *A.* manslaughter in *B.* *ib*
- In this case, if *B.* shoot out of his house and kill *A.* not felony in the rest of the household; nay, tho he had hired an extraordinary guard (as by law he might), yet this not manslaughter in the rest of the company, because assembly lawful *ib*
- Actual abetting will make the rest principals *ib*
- Some present and abetting may be guilty of homicide, and not murder, others of murder *ib*
- The master assaults another with malice prepense, servant ignorant of the malice, takes part with master, and kills the other, manslaughter in servant, and murder in master *446*
- Wherein murder and manslaughter differ *449, 466*
- In appeal of murder, whether jury may acquit, or must find party guilty of manslaughter *Page 449, 450*
- What malice constitutes murder *451*
- Malice in fact defined *ib*
- The distinction of malice in law into its different kinds *451, 455*
- From what circumstances evidences of malice in fact must arise *451*
- It must be compassing some bodily harm *ib*
- A long suit in law not sufficient evidence of malice in fact, but how it may be heightened into malice prepense *452*
- A.* and *B.* are at malice, and reconciled, and after on a new occasion fall out, and one kills the other, not murder; *contra*, if reconciliation counterfeit *ib*
- If malice between *A.* and *B.* and they meet and fight, *A.* gives first blow, yet if *B.* kill him (otherwise than in his own defense) it is murder *ib*
- If malice between them, and *A.* assault *B.* and after flies to the wall, and there in his own defense kill *B.* by some it is murder; *sed quære* *ib*
- A quarrel between *A.* and *B.* *A.* challenges *B.* *B.* declines it, but at length to vindicate his reputation meets and fights, and kills *A.* murder *452, 453*
- A.* challenges *B.* *B.* declines it, but signifies that he will defend himself, if *B.* going about his occasions is assaulted by *A.* and killed, murder in *A.* but if *B.* had killed *A.* it had been *se defendendo*, if he could not escape, otherwise manslaughter; but if only a disguise, murder *453*
- If *A.* and *B.* fall out on a sudden, and presently agree to fight, and each fetcheth a weapon, and goes into the field, and one kills the other, only manslaughter; if they had time to deliberate, murder *ib*
- The child of *A.* beats child of *B.* who runs home to his father, and

A TABLE OF THE PRINCIPAL MATTERS

- and he runs three quarters of a mile, beats the other child, and kills him, manslaughter *Page* 453
- Keeper of a park finding a boy stealing wood bound him to his horse's tail, and beat him, horse ran away, killed the child, murder 454
- From moderate correction of a servant death casually ensues, homicide *per infortunium* ib
- But if master design immoderate correction, or strike with a lethal weapon, and kills servant, murder; what circumstances considerable in this case 454, 474
- One hath liberty of *infangthief*, steward gives judgment of death against a prisoner against law, not murder, *quia factum judicialiter, licet ignorantèr* 454
- Killing without provocation, murder 455
- Wilfully poisoning implies malice ib
- Killing one come to demand debt, or serve process, murder ib
- A.* distorts his mouth, and laughs at *B.* who thereon kills him, murder ib
- A.* passing the street, *B.* takes the wall, and thereupon *A.* kills him, murder; but if *B.* had jostled *A.* it had been only manslaughter; so if *A.* riding on the road, *B.* whips his horse out of the track, and then *A.* lighting kills *B.* manslaughter 455, 456
- Words no provocation to kill a man, nor will they lessen a crime from murder to manslaughter, except words of menace of bodily harm 456
- If *A.* give indecent language to *B.* and *B.* thereon strikes *A.* but not mortally, and then *A.* strikes *B.* again, and then *B.* kills *A.* by *many* only manslaughter ib
- A.* sitting in an ale-house, a woman calls him a *Son of a whore*, *A.* at a distance throws a broom-staff at her, and kills her; *quare*, whether murder or manslaughter *Page* 456
- The nature of the weapon, where-with party is killed, considered 457
- A.* and *B.* at difference, *A.* bids *B.* take a pin out of his sleeve to take occasion to strike *B.* *B.* doth accordingly, *A.* strikes *B.* whereof he dies, murder ib
- A.* chiding between husband and wife, thereon he strikes her with a pestle, and kills her, murder ib
- A.* bailiff comes to execute a process, but hath not a lawful warrant, if such bailiff be killed, only manslaughter ib
- If any minister of justice be killed doing his office, it is murder, tho in the night, or on a Sunday 457. ii. 85
- But if the process be executed out of jurisdiction of the court, only manslaughter; so it is, if court had no jurisdiction of process 458
- Murder to kill an officer, tho he shew not his warrant or mace, where it is not demanded 458, 462
- Tho bailiff use no words of arrest nor shews his warrant, murder to kill him doing his duty ib
- But if officer doth what is not warrantable, as break open window to arrest, there, if slain, manslaughter only 458, 474
- If he enter by an outward door, he may break open inner door, killing him in such case, murder 458, 459
- Where officers may justify breaking open doors to arrest, and consequently murder to kill them so doing 459. ii. 94
- Where constable acts out of his vill without a special warrant, killing him only manslaughter; but killing a private man in execution of a particular precept from a justice of peace directed to him by name to suppress a riot in the vill of *B.* or to arrest one for some misdemeanor, and within

CONTAINED IN THE TWO PARTS.

- within the jurisdiction of the justice, murder; such private man must shew his warrant, or signify the contents *Page* 459
- If justices warrant expresses not the cause sufficiently enough, yet if he had jurisdiction, killing officer in execution of it, murder 460
- Where two constables and their assistants are engaged one against another, and party of one constable kills one of the other party, but manslaughter *ib*
- Sheriff having a writ of possession against house of *A.* *A.* gains constable of vill to oppose sheriff, and in conflict constable is killed, not so much as manslaughter; but if any of sheriff's officers are killed, murder *ib*
- Killing bailiff, constable or watchman doing his duty; murder 457, 460, 463. *ii.* 90, 98
- What sufficient notice that a man is a bailiff, constable or watchman, to make it murder 460 to 464. *ii.* 90
- What a necessary notification of a man's being a private bailiff 461
- Rioters assembled in a house, some issue out and kill a constable's assistant within view, murder in those in the house, who abetted the assault 463, 464
- Killing those, that come voluntarily to a constable's assistance, as well as those that are called, murder *ib*
- Killing assisting during necessary retreat of constable, murder *ib*
- On *hue* and *cry*, tho without justice's warrant, or constable a pursuant is killed by a malefactor, murder; all malefactors in the same field principals; one taken before party hurt, *not guilty*, unless after taken he had animated malefactor to kill the party 465. *ii.* 100
- A press-master impressed *B.* and with assistance of *C.* laid hold on him, *D.* finding fault with *C.*'s rudeness a quarrel arose, *D.* killed *C.* but manslaughter *ib*
- A.* comes to rob *B.* and either without, or on resistance, *A.* kills him, murder *Page* 465, 474
- So if men come to steal deer in a park, or rob a warren, and parker or warrener resists, and is killed, murder *ib*
- If prisoner die by duress of gaoler, murder 466
- What the form of pardon of murder, what of manslaughter: Where a special *non obstante* of 13 R. 2 necessary 466, 467
- How one indicted of murder having a pardon of felony, or *felonica interfectio* must plead 467
- 1 *Jac.* of *stabbing*, tho temporary, by 17 *Car.* 1. continued till some other *act* should be made to continue, or discontinue it 468
- Usual to prefer two indictments, one of murder, another on this *act*, and to try that of murder first, convict on either, ousted of clergy *ib*
- How indictment on this *act* must be to oust clergy; need not conclude *contra formam stat.* good with, or without it *ib*
- Throwing a hammer and killing a man, not a stabbing or thrusting within this *act* 469, 470
- Stabbing, or thrusting with a sword or pike-staff within it; whether a shot with a pistol, or blow with a sword or staff be within it, *quære* 470
- A cudgel in the deceased's hands, a weapon drawn within it, *viz.* such as might do hurt *ib*
- One within words of the *act*, not within the reason *ib*
- If a mason in building voluntarily let fall a stone, and kill another, without due warning, at least manslaughter 472, 475
- Two playing at cudgels, or wrestling by consent, or playing at foils, one casually kills the other, manslaughter 472, 473
- If *A.* cut the hedges of *B.* and *B.* beat him, whereof he dies; manslaughter 473
- Several

A TABLE OF THE PRINCIPAL MATTERS

- Several come to enter *A.*'s house as trespassers, *A.* kills one of them, manslaughter Page 474
- If one throws a stone over an house amongst people to do hurt, the intention makes it murder or manslaughter 475
- Shooting at deer in another's park *sans licence*, the arrow glanceth and kills, manslaughter ib
- Throwing a stone with intent to kill another's poultry, and it kills a by-stander, manslaughter ib
- A.* drives his cart carelessly, and it runs over a child in the street, and yet drives on, and kills the child, murder; but if he saw it not, manslaughter 476
- One riding in the street whips his horse, and runs over a child and kills him, manslaughter ib
- But if he rid so in a press of people to do hurt, and horse had killed another, murder ib
- If there be malice between *A.* and *B.* and they meet and fight upon it, tho *A.* gives first blow, and *B.* retreats as far as he can with safety, yet if *B.* kill him, murder 479
- A.* assaults *B.* *B.* thereon strikes *A.* without flight, and kills him, manslaughter ib
- If *A.* upon malice prepense strikes *B.* and then flies to the wall, and there in his own defense kills *B.* under what circumstances murder, or *se defendendo* 480
- If a prisoner resists not, but flies, yet officer for fear of a rescue strikes him, whereof he dies, murder 481
- Bailiff killing a man flying to avoid arrest in a civil action, murder ib
- If *A.* assaults *B.* first, and *B.* re-assaults *A.* and so fiercely, that *A.* cannot retreat to the wall without danger; nay, tho he fall on the ground upon *B.*'s assault, and then kills *B.* it is not *se defendendo*, but murder or homicide according to the case 482
- Necessity of flying shall not be taken as a flight, in favour of assailant Page 482
- A.* assaults *B.* *B.* by his own courage and address precludes flight of *A.* then *A.* kills him, manslaughter 483
- Killing on a sudden falling out, manslaughter ib
- A.* assaults the master, and servant in defense of him kills *A.* if master not driven to extremity manslaughter in servant 484
- Like law of a master killing in defense of his servant; husband of the wife, the child of the parent, and *à converso* ib
- If husband or father kill one that attempts to ravish the wife or daughter, if it might have been otherwise prevented, manslaughter 485
- Killing one, who pretending title takes goods as a trespasser, manslaughter 485, 486
- Killing a trespasser in defense of a man's house, manslaughter 485, 487
- Killing adulterer in the act with the wife, manslaughter ib
- A.* is suspected by *B.* of felony, tho no felony committed, neither is *A.* indicted, nor probable cause of suspicion, if on offer to arrest him by *B.* he resists or flies, whereby *B.* cannot take him without killing, and *B.* kills him, at least manslaughter; but if a felony committed, and there be cause to suspect *A.* tho innocent, if *B.* kill *A.* in this pursuit, whether it excuse him from manslaughter 490
- If a man have a park within a forest, where he may hunt, and forester kills purloin-man, or his servant hunting in his purloin, murder or manslaughter according to the case 491
- What authority *homicide in execution of justice* requires in the judge that gives, and officer that ex-

CONTAINED IN THE TWO PARTS.

- executes judgment *Page* 497,
498, 499
- Giving judgment of death without
jurisdiction, if executed, mur-
der 497
- Justice of peace gives judgment in
treason, whether murder or mis-
prision only 497, 498
- Where proceeding of judges in ca-
pitals without strict extent of
their commission, or where their
proceeding after their commis-
sion is determined, is not mur-
der, but a great misprision 498,
499
- Executing martial law in time of
peace, murder 499, 500
- Where the judge hath jurisdiction
of the cause, officer executing
sentence *not guilty*, tho the judge
err; but otherwise, if he hath
no jurisdiction 501
- If a stranger of his own head exe-
cute criminal, murder *ib*
- If a private man kills one suspected
on his flight, and refusing to
submit, if innocent, at least
manslaughter, because innocent
man not bound to take notice of
private man, as authorized to
arrest him *ii.* 82, 83
- If one arresting on suspicion break
open doors, if party a felon, justi-
fiable; *contra*, if innocent *ii.* 82
- If before or after arrest, *B.* an in-
nocent man suspected, draw his
sword and assaults *A.* the party
suspecting, and *A.* presses upon
him to take or detain him, and
in conflict *B.* kills *A.* it is mur-
der, or if *A.* kills *B.* it is justi-
fiable *ii.* 83
- If one arrested on suspicion kills
party arresting, (always sup-
posing party arrested innocent,)
only manslaughter *ii.* 84
- Bailiff about to take a prisoner,
before arrest prisoner draws his
sword, and kills him, murder
ii. 83
- If there be a felony done, *A.* sus-
pects *B.* on probable grounds,
and acquaints constable with it,
and desires his aid to take him,
if constable on such arrest or
attempt thereof be killed, it is
murder *ii.* *Page* 92
- If there be a warrant against one
for trespass, or breach of the
peace, and he flies, and will not
yield to the arrest, or being ta-
ken makes his escape, and officer
kills him, murder *ii.* 117
- Vide Arrest, Charge, Homicide
per tout, Indictment.
- ### Mute.
- If prisoner prosecuted on 28 *H. 8.*
for trial of treason, &c. on the
high sea stand mute, he shall have
peine fort & dure *ii.* 17, 318,
319
- Whether *peine fort & dure* be par-
doned by general words of all
contempts *ii.* 252
- In case of demurrer no such judg-
ment can be given *ii.* 257, 315
- Where defendant fails in pleading
not guilty, or putting himself on
his country, it is in law a stand-
ing mute *ii.* 258
- Antiently, if felon peremptorily
challenged above thirty-five, he
was put to *peine fort & dure*
ii. 268
- If before 22 *H. 8.* felon had plead-
ed *not guilty*, and put himself on
the country, and challenged pe-
remptorily under three juries,
whereby jury remained, and a
tales was granted, and he then
stood mute, yet jury past on him
on his plea *not guilty* *ii.* 269, 316
- If prisoner hath pleaded to the
country, and when tried says
nothing, no penance shall be
inflicted, but jury shall be ta-
ken *ii.* 299
- If felon challenge above twenty,
challenge only over-ruled, and
jurors sworn *ii.* 270, 316
- If he hath received his judgment
already, or be convict, and
brought to the bar, and be de-
manded what he can say why
judgment should not be given
against

A TABLE OF THE PRINCIPAL MATTERS

- against him, or why execution should not be awarded, if he say nothing, it shall not be inquired whether he can speak or not, but he shall have present judgment, or execution ii. *Page* 314, 315
- But if a long time hath passed between his conviction and judgment and this second calling to the bar, it is prudent to inquire by witnesses, whether he can speak ii. 315
- If one abjure, or be outlawed of felony and return, and be brought to the bar to shew cause, why execution should not be done, if he stand mute, an inquest of office is to be taken, and if it be found that he hath lost his speech by visitation of God since his abjuration, they shall inquire of the identity of the person before judgment or execution shall be awarded; so if he were brought in on a *cap. utlegat.* or *hab. corpus* ib
- If one indicted or appealed of felony pleads *not guilty*, and puts himself on the country, and jury remains on challenges till another day, and then appear, and prisoner stands mute, yet this not standing mute, for inquest shall be taken on issue already joined ii. 315, 316
- In that case court having any doubt, hath used to inquire by inquest, sometimes by inquiry *ex officio* by inquest impannelled to try the issue, whether he stands mute of malice, or *ex visitatione Dei* ii. 315, 316, 321
- When one said to stand mute ii. 316, 317
- If felon stand mute, court *ex officio* ought to impannel a jury as inquest of office to try, whether it be of malice, or not; and if they find it to be of malice, he shall have judgment of *peine fort & dure*, if otherwise, they are to inquire of all the points material for his defense ii. 317
- On indictment of treason judgment of treason shall be given against party standing mute ii. *Page* 317
- In treason, tho one standing mute shall be convicted, yet there are some antient instances to the contrary, as on indictment for counterfeiting coin, but now the law is otherwise 223, 328
- One arraigned for petit treason, challenging above thirty-five shall have judgment of *peine fort & dure*, and how judgment entered 382. ii. 268, 399, 400
- In appeal, if appellee stand mute, judgment of penance shall be given ii. 317, 321, 322
- One arraigned before lord steward on 33 *H. 8.* and standing mute, shall have judgment, as if convicted ii. 318
- Peer arraigned on indictment of felony before his peers refusing to plead, shall have this judgment ib
- A woman shall have same judgment if she stand mute ib
- One indicted of petit larciny refusing to plead shall have the same ii. 320
- If a woman be indicted for simple larciny of goods under 10s. tho she shall only be burnt in the hand for it, yet if she refuse to plead, judgment of *peine fort & dure* shall be given against her ib
- If a new felony be made by *stat.* tho it be silent as to standing mute, this judgment incident to it ib
- In rape, made felony by *Westm. 2.* if party stand mute, he shall have judgment of penance ib
- If this judgment be given, yet if offense within clergy, clergy allowed ib
- Prisoner to have *trina admonitio* and a respite to bethink himself ib
- Judge to hear witnesses on oath to give a probable testimony of his guilt ii. 321, 322
- If the offense be within clergy duty of judge to allow it, tho not prayed,

CONTAINED IN THE TWO PARTS.

prayed, and that as well after judgment pronounced, as before
 ii. Page 321, 323
 Judgment of penance was by common law ii. 321
 One indicted of felony before justices of *oyer and terminer*, &c. is convicted, if record of conviction be removed into *B. R.* and the prisoner also, he shall be demanded what he can say, why execution should not be awarded on record removed; if he say nothing, it shall be inquired by inquest of office, whether same person ii. 401, 402, 407
 How judgment of *peine fort & dure* entered, where prisoner doth not directly answer ii. 399
 How entered where he stands wholly mute ii. 400

Necessity.

NCESSITY of preserving the peace by taking notorious malefactors excuseth some acts from being felony, which otherwise were felony 53
 The dangerous doctrine of the *casuists* on this subject refuted 54, 55
 By the laws of *England*, if one being under a necessity for want of victuals or clothes, shall on that account clandestinely, & *animo furandi* steal another man's goods it is capital 54
 This rule, *in casu extremæ necessitatis omnia sunt communia*, holds in some particular cases, where by tacit consent of nations, or some particular countries or societies, it hath obtained 55
 If king's enemies come into a county with a power too strong for county to resist, and will plunder the country, unless a composition be made with them, such a ransoming themselves is so far from being treason, that it hath been allowed as lawful, and in what respects 57

Joining with rebels *pro timore mortis* and departing from them as soon as parties can, no levying war Page 139
Quicquid necessitas cogit, defendit, refuted 565
 Difference between times of war and public insurrection or rebellion, and times of peace, for in times of war and public rebellion, when one is under so great a power, that he cannot resist or avoid it, law in some cases allows an impunity for parties compelled, or drawn by fear of death to do some acts in themselves capital, which admit no excuse in time of peace 49
 But if whole circumstances of case be such, that he can conveniently resist or avoid the power of the rebels, he is not excused; if on pretence of fear or doubt of compulsion, he assist them 51
 If a man be menaced with death, unless he will commit an act of treason, &c. fear of death doth not excuse him, and why ib
 If one be desperately assaulted, and in peril of death, and cannot otherwise escape, unless to satisfy his assailant's fury he will kill an innocent man then present, fear and actual force will not acquit him of murder, if he do the fact ib
 A bare fear, tho upon a just cause, and tho it be fear of life, gives not a man power to take away life of another, but what kind of danger it must be 52
 Where *vis major quam resisti potest* excuseth in criminal, tho not in civil actions 139
 Conscience binds not one to keep an oath extorted by menace of death 532
 One of necessity kills a felon or suspected person flying or resisting before, or after arrest, where homicide justifiable, or excused. Vide *homicide*.

Non-

A TABLE OF THE PRINCIPAL MATTERS

Non-feasance. Vide **Infant.**

Non obstante.

Prohibitory clause in 8 R. 2. that
no man of law shall be justice in
his own county, usually dispens-
ed with by a *non obstante*
ii. Page 32

Notice. Vide **Ignorance.**

Placet Record. Vide **Pleas.**

Oath. Vide **Alligance**

Overt Act. Vide **Treason.**

Outlawry.

AT what age awardable against
an infant for felony on in-
dictment 23. ii. 208
Possibly process of outlawry may
go against receiver of a traitor
at same time as against princi-
pal, and tho principal appear,
process may go on against the
other; *contra* in felony 238
A traitor rendering himself on out-
lawry within a year shall be re-
ceived to traverse indictment 295
What *acts* take away from person
outlawed for treason advantage
of reversal of outlawry, because
party out of the realm, but extend
not to other offenses 354
Where justices of *oyer and terminer*
may issue process of outlawry
ii. 31
On inquisition before coroner re-
turned before justices of *gaol-*
delivery, they cannot make pro-
cess of outlawry ii. 37
They cannot make out *cap.* or *exi-*
gent ii. 199
A. and *B.* indicted before justices of
peace, indictment delivered over
to justices of *gaol-delivery*, *A.*
appears and is acquit, *B.* appears
not, record must be removed in-
to *B. R.* and thence process of
outlawry issued ii. 37, 38

Justices of peace by common law
in their sessions may proceed to
outlawry on indictments found
before them, and in popular ac-
tions by statutes ii. Page 52

21 *Jac.* gave process of outlawry
in popular actions ii. 113

But they cannot issue *capias utlega-*
tum, but must return record of
outlawry into *B. R.* and thence
it shall issue ib

Whether coroner can make out
process of outlawry against de-
fendant in appeal ii. 67, 199

Where process of outlawry lies
against a *peer*, or not ii. 177,
199, 200

In some cases on indictment it lies
not against a commoner ii. 194

Whether outlawry an attainder
521. ii. 205, 206, 350, 352

Tho attainder, yet small excep-
tions are allowed to process or
return, and so by writ of error
easily reversible, and party put
to plead to indictment ii. 198

One outlawed prays respite to pur-
chase a writ of error, *B. R.* u-
sually prefixeth a day for that
purpose, and in mean time re-
mits him to marshal, and re-
spites his execution; but priso-
ner must alledge error in law or
fact to satisfaction of court; if
court dissatisfied, they may a-
ward execution presently ii. 408

One attain by outlawry of trea-
son, &c. shall not be appealed
or indicted till outlawry rever-
sed ii. 252

If two coroners in a county, or
more, one may execute the writ,
as in case of an *exigent*; but re-
turn must be in name of *corona-*
tores 417. ii. 56, 195

By 5 *E. 3.* justices of *oyer and ter-*
miner may issue process against
felons in a foreign county 576

In whose name, and under whose
teste such process shall issue;
clerk of assise has a special seal
for them 576. ii. 199

Tho indictments be not disconti-
nued by demise of *king*, in some
cases

CONTAINED IN THE TWO PARTS.

cases process are ii. Page 189, 209
 In indictments of trespasss, *venire facias* first process, and when *non est inventus* is returned, *cap.* and *exigent* ii. 194
 In all indictments of felony or treason process by *cap.* and *exigent* lies, and at common law there was but one *cap.* and on *non est inventus* and *exigent*, and so to the outlawry 576. ii. 194
 In what cases 25 E. 3. requires two *capias*'s, and how second *capias* returnable ii. 194
 It extends not to treason; *exigent* in treason must issue on return of *non est inventus* on first *cap.* ib
 So in indictment of murder or appeal of robbery, but in B. R. there shall be two *cap.* in indictment or appeal of robbery ib
 At this day process on indictment of any felony is only one *cap.* and then *exigent* ii. 195
 25 E. 3. an impracticable law ib
 But by 8 H. 6. in indictments or appeals of treason, or any felony or trespasss against one of another county, after one *cap.* a second *cap.* with *proclamations*, and how returnable, shall be granted to sheriff of that county, wherein he is supposed to be conversant, before *exigent* shall issue 576. ii. 195
 But if party were conversant in county, where indicted, at time of felony or treason committed, process to be at common law ib
 A proviso in 8 H. 6. not to extend to B. R. or Chester ii. 195
 By 10 H. 6. same process [as by 8 H. 6.] directed on indictment of felony or treason removed into B. R. by *certiorari*, or into any other courts ib
 Indictments of felony or treason originally taken in B. R. are not within these *aets*, but by 6 H. 6. before *exigent* awarded court shall issue a *cap.* to sheriff of county, where indictment taken, and another to sheriff,
 Vol. II.

where party is named, having six weeks time at least before the return ii. Page 195
 6. H. 6. made perpetual by 8 H. 6. 576
 These *aets* of little effect; for if party was conversant in county, where fact committed, (as he cannot be otherwise) then he may be named of that place in indictment, and process is to go as at common law before these *aets*; and this is now the usual course ii. 196
 If J. S. be indicted in county of B. for a felony there committed, and indictment runs J. S. *nuper de A. in com. B. alias dict.* J. S. *nuper de D. in com. S.* there shall no process go to sheriff of S. because that addition is only in the *alias dictus*, and therefore process shall only issue in county of B. and same law in appeal ib
 If it runs, J. S. *de A. in com. B. nuper de C. in com. D. cap.* shall issue only in com. B. but if it runs, J. S. *nuper de A. in com. B. nuper de C. in com. D.* a *cap.* shall only go into the county of B. where he is indicted, but on return thereof, (if it be before commissioners) a *cap.* with proclamations shall issue to sheriff of D. and if in B. R. on an indictment found there, one *cap.* to one sheriff, and another to the other sheriff, according to 6, 8 & 10 H. 6. ib
 If one be indicted by name of J. S. *nuper de A. in com. Cestriae*, the second *cap.* with proclamation shall be awarded to the prince, or his lieutenant, and the like to bishop of *Durham*, or chancellor of *Lancaster* ii. 196, 197
 Exposition on 2 H. 5. enabling the chancellor on complaint of any felony or riot to issue a *cap.* and writ of proclamation ii. 197
 Tho this be marked as an obsolete statute, no *aet* repeals it, save implication of 16 C. 1. which it seems not to do ib
 Yet

A TABLE OF THE PRINCIPAL MATTERS

- Yet never put in ure ii. Page 198
- B. R. either on indictment taken before them, or removed thither by *certiorari*, may issue *cap.* and *exigent* into any county in *England* on a *non est inventus* returned by sheriff of county, where party indicted, and a *testatum* that he is in some other county ib
- In appeal by writ against principal and accessory, which is general till declaration, plaintiff must at his peril distinguish the process, for if he take his *exigent* against all, he must count against all his principals ii. 200
- But in appeal by bill or indictment, *cap.* is against them all, but when it comes to the *exigent*, it shall issue only against principal, and process be continued by *cap.* infinite against accessory till principal be outlawed, and then *exigent* shall issue against accessory ib
- If accessory appear on *cap.* he shall not be let to bail, and have *idem dies* by bail till process be determined against principal ib
- If two be indicted as principals in felony, and another as accessory to them both, *exigent* against accessory shall stay till both be attainted by outlawry or plea ib
- If one of the principals be acquitted, whether accessory shall be discharged 624. ii. 200, 201
- Whether there be any, and what diversity in this case between indictment and appeal ii. 201
- If defendant render himself to sheriff before *quinto exactus*, and appear in court at return of the *exigent*, and plead, and is bailed, and then makes default, inquest shall not be taken by default in felony, either in indictment or appeal, tho it may in other cases, but a new *cap.* shall issue, and after that an *exigent*, and a *cap.* against the bail ii. 201, 202
- Where *exigi fac.* with an *allocato comitatu* shall issue, and where *exigi fac. de novo* ib
- Demand of party to be at five county-courts successively held one after another, without any court intervening ii. Page 201
- If where there are but two county-courts before return, if after second *exactus* defendant render himself, and find *mainprize*, and at return make default, there shall issue no *exigi fac.* with an *allocato com.* but a new *exigent*, and a *cap.* against the bail ii. 201, 202
- How an *exigi fac.* with *allocato husting* proceeded on ii. 202
- If defendant appear on *cap.* and plead to issue, and is then let to bail, and then makes default, a *cap. ad audiendam juratam* shall issue, and if not taken thereon, *exigi fac. de novo*; but if brought in, he shall be tried on his plea ii. 202, 224
- But if he render himself on *exigent*, and plead *not guilty*, and be let to bail till trial, and then make default, whereon *exigent* is awarded, and he is brought in thereon, he shall plead, and be arraigned *de novo*, for by *exigent* awarded first issue is discontinued ii. 224
- If on *cap.* or *exigent* sheriff return a *cepi corpus*, and at the day hath not the body, he shall be punished, but no new *exigent* awarded, because in custody of record ii. 202
- But if party returned outlawed, process *cap. utlegatum* ib
- If party outlawed be in a house, and doors refused to be opened, constable, or any other person in pursuit of one outlawed for felony, may break open doors and take him ii. 203
- What certainties return of outlawry must have ii. 203, 204
- Where a *certiorari* issued to coroners to certify the truth in order to amend return of outlawry ii. 03
- Goods forfeited from *teste* of *exigent* ii. 204, 206
- In

CONTAINED IN THE TWO PARTS.

In appeal, if *exigent* be well awarded, tho writ of appeal abated, forfeiture of goods by *exigent* stands in force *Page* 204
 Tho outlawry be reversed for error in law or fact, *exigent* being well awarded, forfeiture of goods stands ii. 204, 205
 Special writ of error lies on award of *exigent* for party or his executors to reverse award of *exigent* ii. 205
 Instances of errors in fact ii. 205, 207, 208
 Avoiding outlawry avoids not *exigent*, if well awarded ii. 205
 If party render himself after *exigent* awarded, and plead to indictment, and is found *not guilty*, forfeiture by *exigent* stands ib
 Necessary for party outlawed in felony to bring his writ of error specially, *tam in adjudicatione brevis de exigi facias, quam in promulgatione utlegariæ* ib
 Error in *exigent* cause to reverse outlawry, and error in appeal or indictment, on which *exigent* is awarded, is cause to reverse both outlawry and *exigent* ib
 Without judgment of reversal in a writ of error forfeiture by *exigent* awarded stands, tho indictment quashed, or appeal abated ib
 Outlawry gives forfeiture of lands in treason to the *king*, and in felony to *lord* ii. 206
 But bare judgment of outlawry without return of record is no attainder, nor gives any escheat ib
 It must be returned by sheriff with writ of *exigi facias*, and return indorsed ib
 If there be a *quinto exactus*, and thereon *utlegatus est per judicium coronatorum*, but no return thereof made, there lies a *certiorari* to the coroners, or sheriff and coroners, to certify same in *B. R.* and for what purpose ib
 Till return by sheriff party outlawed not disabled to bring an action ib
 Barely on return of outlawry on a *certiorari* without *exigent* indors-

ed and returned together with *certiorari*, no writ of escheat lies for the lord ii. *Page* 206
 If *certiorari* be directed to sheriff and coroners, and *exigent* be extant in court, and they return this outlawry, possibly it may be a sufficient warrant to enter it of record as a return on the *exigent* ib
 Unless *exigent* is some way returned or extant, it gives *king* no title to land or goods, it is the warrant of the outlawry ii. 207
 Without *exigent* and return of outlawry on it there is neither disability, forfeiture, nor escheat ib
 A *certiorari* not grantable to coroners to remove outlawry after party's death ib
 Outlawry avoidable by plea, by writ of *identitate nominis*, or by writ of error ib
 No error in fact, if *defendant* be imprisoned, provided he be brought to the bar, and demanded, if he will appear and refuse ii. 208
 Of avoiding outlawry of felony because *beyond sea*; the distinctions, where one goes *beyond sea* voluntarily, or in *king's* service, and where he goes before *exigent* awarded, or after ib
 How errors in these cases are assigned; how attorney general to plead to the errors, &c. ib
 Error brought on outlawry in felony, record of outlawry *cum omnibus ea tangentibus* is removed into *B. R.* ii. 209
 Party must render himself in custody, and so must come in person to the bar, and when demanded what he can say, he is to pray allowance of writ of error ib
 Writ being allowed, record is to be removed; what parts record consists of ib
 Then party to assign errors in person, and a day is given to *king's* attorney to reply to him, and in mean time a *scire fac.* to *lord* 1 i 2 mediate

A TABLE OF THE PRINCIPAL MATTERS

- mediate & immediate* is to issue, returnable at fifteen days *ad audiendum errores* ii. Page 209
- If any lords appear, they may plead to the errors; if sheriff returns *there is no land*, then court proceeds to examine errors ib
- Outlawry being reversed, defendant to answer indictment; where indictment to be tried ib
- For forfeiture by outlawry and to what time it shall relate.* Vide **Forfeiture**.
- What judgment in outlawry of felony or treason, and what award of execution to be made.* Vide **Judgment**.
- Vide **Gaol-delivery, Justice of Peace, Oyer and Terminer**.
- Oyer and Terminer.**
- Justices must be by commission, and not writ, otherwise their proceedings void 498. ii. 23
- May issue warrants in the counties within their commission for taking felons or surety of peace within their limits 579
- Quære*, whether they may not issue their warrants to take any indicted of felony within their precincts, tho they be abroad in a foreign county, by 5 E. 3. ib
- Distinction between ordinary and delegate, justices of *oyer and terminer* ii. 22
- To whom commission directed, and how it runs ii. 22, 23
- Commissioners before their sessions issue a precept in writing to sheriff to return a jury of same form, as commissioners of *gaol-delivery* do, but precept by justices of *gaol-delivery* may be *ore tenus* ii. 23, 34
- The substance of the precept ii. 26, 27
- Others may be added, or their power contracted by *association*, or *si non omnes*, and so in commissions of *gaol-delivery* ii. 23
- One sitting without adjournment determines their commission, but tho appointed *pro hac vice* only, they may continue their session from day to day by adjournment; the like for all other commissions Page 498, 499. ii. 24
- Not always necessary to enter adjournment on record, (tho in many cases fit), and if not entered, session relates to first day, and records are entered as of that day ii. 24
- Where necessary to enter their adjournment ii. 24, 261
- How many ways these commissions are determined ii. 24, 25
- Supersedeas* suspends their power, *procedendo* revives it ii. 25
- How many kinds of notice of a new commission determines the former 499. ii. 25
- Where a general commission is determined *pro tanto* by a special commission ii. 21, 25
- Where a special by a general, or not ib
- If there be a general commission, and a special one for a franchise, &c. *infra com.* both dated same day, both stand ii. 26
- General commission extends *tam infra libertates, quam extra* ib
- Regularly they cannot proceed on any indictment taken before others than themselves, and therefore they cannot proceed on coroner's inquest or indictment of felony before justices of peace ii. 21, 27
- This rule extends only to general commissions ii. 27
- Not to inquisitions taken before other commissioners of *oyer and terminer* ib
- A general power is given by statute to justices of *oyer and terminer* to proceed on indictments taken by former justices ii. 27, 405
- How precept to return a jury ought to be, and how the sheriff ought to return it ii. 26, 27, 260, 261
- Whether they may proceed same sessions against a party indicted before them ii. 28, 29, 261
- Differ.

CONTAINED IN THE TWO PARTS.

Difference, where party in prison,
or at large ii. Page 29

Difference between treasons and
felonies, and other crimes ib

Whether, if cognizance of an of-
fense be limited to *any court of*
record, it may be heard and de-
termined by them ib

They cannot assign a coroner ii. 31

Where by statute, they may issue
process of outlawry into any
county, and a *capias utlegatum*
ii. 31, 199

They are to send their records de-
termined into the *Exchequer*,
but to take out their estretes
first ii. 31

How their precepts and processes
are to be signed and sealed ib

How they antiently made their
warrants for execution of capital
offenders ib

They cannot deliver prisoners by
proclamation ii. 34

May originally take indictments of
felony of prisoners in gaol ib

Justices of *oyer and terminer*, *gaol-*
delivery, and the peace may
make up their record by all
three of their powers, and best
shall be taken for the *king* ii.
34, 166

They may take indictments of trea-
son, if parties in gaol, and may
try and give judgment ii. 35

Whether they, if an *aet* limit an
offense to be heard before jus-
tices of peace, have a jurisdic-
tion ii. 36

Where an *aet* speaks only of justi-
ces in the county, they may hear
and determine it ib

On trial of felons before them, if
prisoner challenge twenty, so
that there be not sufficient re-
maining of the pannel, *tales* to
be granted by precept return-
able, as case requires; *contra*,
on trial before justices of *gaol-*
delivery ib

They may sit out of a franchise,
and determine misdemeanors
within the same ii. 38, 39

New commissioners may award
execution on one reprieved ii.
Page 405

But not fit to give judgment, or
award execution on one re-
prieved by another judge with-
out knowing reason of reprieve
ii. 406

All precepts that issue at sessions
of *oyer and terminer*, as *venire*
fac. &c. ought strictly to be by
precept, and under seals of the
justices, but precepts by justices
of *gaol-delivery* need not be o-
therwise than by award on the
roll ii. 410

Special commissions of *oyer and*
terminer may be limited to par-
ticular rivers, extending to seve-
ral counties, but then every
county must have a particular
session *pro tanto* ii. 21

In case of a commission of *oyer and*
terminer, or *gaol-delivery* to any
city or town not a county, a ge-
neral commission for the county
after notice or session, by virtue
thereof determined the special
commission; but this remedied
by 2 & 3 P. & M. ii. 21, 25, 26

Special commissions of *oyer and ter-*
miner may be for some special
offenses ii. 21, 27

To hear and not determine; where
lawful, or not ii. 21

Of a commission to determine and not
inquire ib

But sometimes, where indictment
taken before justices of *oyer and*
terminer in proper county, spe-
cial commission may issue to de-
termine it in another county;
but it must be tried by jury of
proper county ii. 21, 22, 27

Vide Commission, Court, Gaol-
delivery, King's Bench, Trial.

Palace.

WHAT the extent of [it for
trial of felonies within
the same ii. 8, 9

A TABLE OF THE PRINCIPAL MATTERS

For trial of such felonies. Vide
Court.

Pardon.

Capital punishments may be discharged by all parties interested; by appellant by release, by king by his pardon *Page 9*

Tho a pardon restores not the blood, yet as to issues born after, it is a restitution *358*

At common law a pardon of all felonies (*petit treason* being not excepted) extended to *petit treason*, and so now doth a pardon of murder *378*

Where all felonies are pardoned by act, but murder is excepted whether a murder, which is *petit treason* be excepted *378. ii. 340, 342*

In case of a mortal wound given, if *mesne* between stroke and death there comes a general pardon, whereby all misdemeanors are pardoned, this pardons the felony consequentially, and why *426*

By 13 R. 2. pardon of murder must either be by exprefs word of murder, or else it must be a pardon of *felonica interfectio*, with a special *non obstante* of 13 R. 2. *466, 467. ii. 45*

Pardon of manslaughter may be general by the words *felonia* or *felonica interfectio* only *467*

If one indicted of murder obtains a pardon of felony, or *felonica interfectio*, and is afterwards arraigned on that indictment, he must plead *quoad murdrum*, &c. *not guilty*, and as to the felony and interfection his pardon *ib*

Antiently pardon of all felonies discharged some treasons *498*

Approver vanquishing appellee in battle shall have his pardon *tanquam ex merito justitiæ* *ii. 233*

Whether *peine fort & dure* be pardoned by general words of all contempts *ii. 252*

King's pardon renders an infamous man a competent witness, for it takes away *pœnam & culpam in foro humano*; but his credit is to be left to the jury, yet not a lawful juryman *ii. Page 278*

Pardon of all felonies extends not to piracy *ii. 370*

How plea of pardon shall conclude, and how judgment shall be entered *ii. 391, 392*

In margin of roll in such case is commonly entered *literæ patentes allocantur sine die, &c.* *ii. 391, 392*

Parent and Child.

Command of parent excuseth not child in treason or felony *44, 516*

For homicide in parent defendendo the child, and è converso. Vide **Homicide, Murder, and Manslaughter.**

Park.

Park or warren must be either by charter or prescription *491*

Where homicide justifiable, or not, by statute *de malefactoribus in parcis.* Vide **Homicide, Murder, and Manslaughter.**

Parliament.

War succeeds best, when concerted with the parliament *159*

Caution used in 28 H. 8. for pardon of the attempt to repeal 25 H. 8. unnecessary, for parliament not restrained by a precedent act *280*

Vide **Impeachment, Treason.**

Peace-Officers.

Are under more special protection than private men *481*

Law

CONTAINED IN THE TWO PARTS.

- Law makes every one an officer to take a felon flying or resisting *Page* 489
- Constable bound to execute his warrant, and to pursue on *hue* and *cry*; if he doth not, he is indictable for a contempt 490
- If peace-officers or assistants kill rioters resisting them, they are dispunishable, either by common law or statute 494 to 497
- Where constable may command others to assist him; and if they refuse, they are fineable 495, 588
- In courts of *oyer* and *terminer*, &c. sheriff and his substitutes are the ordinary ministers in execution of criminals 501
- Officer not supposed constable of the law, or to advise with counsel on all occasions 578
- Every one within vill to take notice of constable in the day; *contra* in the night without a special notification 461
- Stocks the prison of the constable 596
- Authority of constable, tithingman, headborough, and bursholder, much the same ii. 96
- Constable of a hundred a distinct officer, introduced by stat. of *Winton*, yet a conservator of the peace ib
- The several kinds of watchmen ib
- Watch appointed by statute of *Winton*, from what time to be kept; to be set by the constable; neglect thereof punishable; of the duty of such watchmen ii. 96, 97
- What the use of the watch kept by constable *ex officio*; regularly constable ought to be in company with them in their walk and watch ii. 97
- What the power of watch appointed by justices of peace ib
- Safer way to appoint them by order of sessions, or *B. R.* ib
- Watchman hath a double protection: as assistant to constable, when present, or in the watch, and as a watchman set by order of law ii. 97, 98
- Law takes notice of his authority *sub eo nomine*, and therefore killing him in execution of his office, murder ii. *Page* 98
- He may arrest night-walkers, and commit them till morning, and also felons and persons suspected of felony ib
- Where killing them in execution of their office, murder, &c. Vide *Homicide, Murder, and Manslaughter.*
- Vide Arrest per totum, Escape, *Hue* and *Cry*, Justice of Peace, Rescue, Riot.
- ### Peers.
- A peer in *Ireland* tried here by a *Middlesex* jury for a treason there 155
- In misprision of treason or felony, or being accessory thereto, a peer tried by his peers, tho indicted by common grand inquest 374, 704
- How lord high steward elected and commissioned for trial of peers, and of his office and duty 350
- Of the court before lord high steward for trial of peers ii. 7
- That subject amply treated of by lord Coke ib
- Indictment of a peer good *sans* addition ii. 177
- In trial of peers no challenge allowed; for they are not only triers of fact, but in some respect judges ii. 275
- Peer arraigned on indictment of felony before his peers, refusing to plead shall have judgment of *peine fort & dure* ii. 319
- Where process of outlawry, or *cap. pro fine*, lies against a peer, or not ii. 177, 199, 200
- What warrant issued by lord high steward for execution of a peer 501. ii. 409
- What parts of execution for treason may be abated by king's warrant under great or privy seal, &c. 370. ii. 412
- 1 i 4
- For

A TABLE OF THE PRINCIPAL MATTERS

For the clergy of peers. Vide Clergy.

Peine fort & dure. Vide Mute.

Petit Larciny. Vide Larciny.

Perjury.

If perjury be committed, that is within 5 *Eliz.* but indictment concludes not *contra formam stat.* yet it is good at common law, but not to bring party within the corporal punishment of the *act*. ii. Page 191, 192

Petit Treason.

To what particulars 25 *E. 3.* reduces petit treason 377, 378

One having committed this offense may be indicted of murder 378

Servant kills master on a sudden falling out, not petit treason, but manslaughter ib

If wife or servant procure a stranger to kill the husband or master, procurer only accessory to murder, and being only accessory, where the principal is only murder, cannot be petit treason; but if wife and servant conspire death of husband, and servant effect it in absence of wife, it is petit treason in servant, and she is accessory *before* to it, and shall be burnt 378, 379, 381, 382

If wife or servant, and a stranger conspire to rob husband or master, and servant or wife be present, and hold candle, while husband or master is killed, stranger is guilty of murder, and wife and servant of petit treason as principal 379

Wife or servant intending to kill a stranger, by mistake kills husband or master, petit treason ib

If wife or servant conspire with a stranger to kill husband or mas-

ter, if he or she be in same house when fact done, tho not in same room, he or she is principal in petit treason; if absent, he or she only accessory *before* to murder Page 379, 383

If wife or servant command one to beat husband or master, and he beat him, whereof he dies, if wife or servant in same house, petit treason in wife or servant as principal, but murder in stranger 380

What will make a man guilty or principal in murder will make him such in petit treason ib
Eadem lex for an inferior clergyman in relation to his killing his superior ib

Who shall be said a servant or master within 25 *E. 3.* with regard to this offense ib

This *act* shall not be extended by equity ib

Who is a wife within it, or not 381

Where it is petit treason for a clergyman to kill his prelate or metropolitan ib

Principals in petit treason, as well *before* as *after* 382

One arraigned of petit treason standing mute, or challenging above thirty-five peremptorily, shall have judgment of *peine fort & dure* 382. ii. 399, 400

Whether exclusion of clergy from murder by 1 *E. 6.* ousts it also in petit treason 340 to 343

Auterfoits acquit, or *attaint* of murder, a good bar to indictment of petit treason, and *à converso* ii. 246, 252

Vide Clergy, Indictment, Judgment, Pardon.

Physician.

Physician or surgeon, tho not licensed, gives a potion with a good intent, which kills the patient, no homicide 429, 430

Physicians and surgeons are to be licensed according to 3 *Edw. 1* 429
H. 8. 429

In

CONTAINED IN THE TWO PARTS.

In what cases statute of 34 & 35
H. 8. dispenseth with the pe-
nalties of the former acts
Page 429

Piracy.

How indictment to be to work a
corruption of blood 355
Common law takes no notice of it
under name of felony ii. 18, 370
1 E. 6. & 1 M. repealing all new
felonies *tempore* H. 8. extend
not to piracy 664
Pardon of all felonies reacheth it
not ii. 370
Vide Admiralty, Clergy, In-
dictment,

Plague.

1 Jac. now discontinued 432
If one infected goes abroad with in-
tent to infect another, who dies
of it, whether it be murder ib

Plea.

If one indicted of murder obtains
a pardon of felony, or *felonica*
interfectio, and is afterwards ar-
raigned on that indictment, he
must plead *quoad murdrum not*
guilty, and as to the *felony and*
interfection his pardon 467
If found guilty of murder, he
shall have judgment; if not, his
plea shall be allowed ii. 258
How plea of pardon concludes
ii. 391
If owner of goods stolen supposed
in indictment be a *feme covert*,
or appear to have no interest or
possession in the goods, the par-
ty shall be acquit; but may be
indicted *de novo* for the goods
of husband, or true proprietor
513
If A. be indicted as principal, and
B. as accessory *before* or *after*,
and both be acquit, yet B. may

be indicted as principal, and
former acquittal as accessory is
no bar Page 625. ii. 244
But one indicted as principal and
acquitted, shall not be indicted
again as accessory *before*; and
if he be, his former acquittal is a
good bar, for it is in substance
same offense; but antient law
was otherwise 626. ii. 244
If he be indicted as principal or
accessory *before*, and acquitted,
he may yet be indicted as ac-
cessary *after*, they being of-
fenses of several natures ib
If there be an inquisition of mur-
der or manslaughter, and an
indictment for same offense, and
party is acquitted on indict-
ment, 'tis necessary to quash
inquisition, or arraign party
upon it, who in such case may
plead *auterfoits acquit*, or *not*
guilty ii. 65
In all cases of *homicide by necessity*,
which are no felony, where the
matter is specially presented, as
it may, party shall be presently
discharged, without being put
to plead; but then this acquittal
by presentment is no final dis-
charge, for he may be indicted
and arraigned again afterwards,
if matter of former indictment
false; but *contra*, where indict-
ment or coroner's inquest is of
murder or manslaughter, and
thereon he is arraigned and
tried, and this special matter
proved in evidence, he shall be
acquit thereon, and this ac-
quittal is a perpetual bar a-
gainst any other indictment for
same death 491, 492. ii. 158,
246, 247, 303, 304
Same law in case of homicide *se*
defendendo, or *per infortunium*,
only petit jury shall find the
special matter, and not acquit
the party ii. 158, 246, 247
Where offense made felony, or
otherwise penal by statute, if
by proviso in same, or by any
subsequent act some cases are
ex-

A TABLE OF THE PRINCIPAL MATTERS

- exempted out of it, indictment need not mention and qualify the offense, so as to exempt it out of the proviso; but party shall have advantage of it on *not guilty*, and in same manner shall have the benefit of subsequent *act* to excuse him by 21 *Jac.* ii. Page 170, 171
- If year be mistaken in indictment of felony or treason, and therefore offender be acquit, it is an erroneous acquittal, and yet shall be a good plea of *auterfoits acquit* ii. 179
- If one indicted of murder *cujusdam ignoti*, or assault *in quendam ignotum*, be acquitted or convicted, and afterwards indicted for assault or murder of such a man by name, he may plead former conviction or acquittal, and aver it to be same person ii. 181
- By statute *auterfoits acquit* of principal or accessory, or *auterfoits attain* of principal on indictment is no bar to an appeal; but *auterfoits acquit* on appeal remains a bar to indictment for same offense ii. 220, 250
- Auterfoits acquit* of robbery, rape, &c. on indictment a good bar to appeal of robbery, &c. ii. 250
- In favour of appeal, if one be indicted of murder, and plead to it, and be convicted, and wife enter appeal for same death against prisoner, pending appeal judgment shall be respited; but if wife be nonsuit judgment shall be entered on the conviction ii. 220
- If one be both indicted and appealed before same justices of same murder, or other felony, and plead, party shall be arraigned on appeal first, and not on indictment; and if appellant be nonsuit on his appeal; prisoner shall be arraigned on appeal, and process shall cease on indictment; and if prisoner plead, or be acquitted, or plead *king's pardon*, and it be allowed, regularly acquittal, or pardon and allowance thereof shall be entered on appeal, tho it be safe to enter it likewise on indictment; if there be no *cesset processus* on indictment, and party be outlawed, he hath no remedy, but by writ of error on the outlawry, and he may assign for error his acquittal on appeal, and aver it to be same felony Page 221
- If a *cap.* be awarded against a felon, and he render himself, and plead *not guilty*, and is let to bail, and then makes default, a *cap. ad audiendam juratam* shall issue, and if brought in, he shall be tried on his plea; but if he render himself on the *exigent*, and plead *not guilty*, and be let to bail till trial, and then make default, whereon an *exigent* is awarded, and felon is brought in on the *exigent*, [*quære* whether] he shall plead *de novo* ii. 224, 225
- The several kinds of pleas on arraignment ii. 236
- Of pleas declinatory ib
- In all cases of misnomer party must plead over to felony ii. 238, 248, 255, 256
- All foreign pleas to be tried by jury of county where party indicted, except in treason ii. 239
- Regularly in all pleas, whether to the writ, or in bar, by matter of record or fact, or both, if plea doth not confess, as a plea of pardon to indictment, or of release to an appeal, tho this plea be found against him by issue tried, or adjudged against him by the court, yet he shall not be convicted thereon, but plead over to the felony *not guilty*, as well in indictment as appeal ii. 239, 248, 255, 256
- If one be indicted of felony, and plead a pardon, as if indictment be of murder, and he plead a pardon of felonies, or the like, he need not plead over to the felony,

CONTAINED IN THE TWO PARTS.

- felony, because it suits not within his plea ii. Page 256
- Yet if pardon on demurrer by king's attorney, or an advisement of court, be adjudged insufficient, party shall be tried for the felony ii. 256, 257
- The several kinds of pleas in bar ii. 240, 241
- Of what kinds of matters plea of *auterfoits acquit*, &c. consists ii. 241
- Counsel shall be assigned to put plea in form ib
- Prisoner must shew record of his acquittal, or vouch it in same court ii. 241, 242, 243
- The like of attainder in case of *auterfoits attaint* ii. 241, 242
- Regularly, if a record be pleaded in bar, and declared on in same court, other party shall not plead *nul iel record*, but have *oyer* of record; and if it be in another court, he shall plead *nul tiel record*, and day be given to procure record, or certificate thereof ii. 241, 242, 243
- Prisoner may remove tenor of his record of acquittal into chancery by *certiorari*, and have it in *poigne*, or sent to the justices by *mittimus sub pede sigilli* ii. 242
- If one be arraigned in *B. R.* on indictment removed or found before them, who hath been formerly acquitted of same felony, either before justices of peace, or gaol-delivery, court will grant a *certiorari* to remove the record before them, and respite his plea, till he can remove his acquittal into the court, that so he may form his plea upon it, for record is part of his plea ii. 142
- Plea must set forth record in certain; how it is to conclude ib
- Record must be removed by writ, for tho *B. R.* may take an indictment, or other record of justices of peace *propriis manibus*, where it is to be proceeded on for the king, yet they cannot take record of acquittal to serve prisoner's plea without writ ii. Page 142
- If one pleads *auterfoits acquit de mesme felony*, and vouch the record, court may examine proof, that it is same felony, and thereon allow it, without any confession by king's attorney; but what the safest methods ii. 242, 243
- Plea allowed by testimony of justices of peace before whom he was acquit ii. 243
- If prisoner be arraigned before justices of *gaol-delivery* in the country, and plead *auterfoits acquit* of same felony before same justices in that county, or other justices of same county that were before them, or in *B. R.* how plea to conclude ib
- Of what averment matter of fact of the plea consists ib
- There must not only be acquittal by verdict, but a judgment thereon, *quod eat inde sine die*, and pleaded also ib
- Acquittal regularly a warrant for entering of judgment at any time after ib
- One may plead *auterfoits acquit* notwithstanding variance in the times alledged in first and second indictment, and aver it to be same felony ii. 244
- If one be indicted for murder of *J. S.* and acquitted, and after indicted for murder of *J. N.* yet he may plead *auterfoits acquit*, and aver it to be the same man, & *que conus per l'un nosme & l'autre* ii. 244, 245
- Where there is a different vill laid in the first and second indictment, he may plead *auterfoits acquit*, and aver it to be same vill, but *contra*, where party indicted, first in one county, and then in another, but said to be otherwise in an appeal ii. 245
- If one commit a robbery in one county, and carry the goods into another, and is indicted of larciny in foreign county, and is

A TABLE OF THE PRINCIPAL MATTERS

- is there acquitted of the larciny, it is no bar to indictment of robbery in proper county, because another offense ii. Page 245
- Neither is it a bar to indictment of larciny in proper county ib
- Burglary committed, and goods stolen, if indicted of larciny for goods stolen and acquitted, yet he may be indicted for burglary, and *è converso* ii. 245, 246
- One acquitted for stealing the horse, may be arraigned and convict for stealing the saddle, tho both done at same time ii. 246
- Acquittal of murder a good plea to indictment of manslaughter, or *è converso*, so acquittal of murder a good bar to indictment of petit treason, and *è converso* ii. 246, 252
- It must be acquittal on trial either by verdict, or battle ib
- Party acquitted by misdirection of judge, may plead it ii. 247
- Special verdict found in felony, and court erroneously adjudge it no felony, as long as that judgment remains unreversit, if prisoner be indicted *de novo*; he may plead *auterfoits acquit* ii. 247, 248
- If judgment reversit, party may be indicted *de novo*; but *quære*, whether in point of the verdict party shall not be executed ii. 247
- If at common law one had been suspected of murder, and arraigned within the year and acquitted, tho arraignment should not have been, yet it stood as a good acquittal pleadable to another indictment, or appeal ii. 247, 249
- Auterfoits acquit* no plea, where indictment insufficient, or contains no felony ii. 247, 248
- One must be *legitimo modo acquietatus* ii. 248
- If error only in process in appeal, or indictment, and yet prisoner appear and plead *not guilty*, and be acquit, this acquittal pleadable ii. Page 248
- One attain on insufficient indictment shall not be arraigned on new indictment for same offense, unless former judgment first reversit ib
- Where a wrong person brings an appeal, *auterfoits acquit* is no plea, neither is it a bar to the king, but he may be indicted *nient obstante* that acquittal; and if right heir bring a new appeal, and be nonsuit, he may be arraigned on that appeal at king's suit ii. 249
- If defendant be acquit on appeal of murder, or robbery by verdict, regularly a good bar to indictment ib
- Acquittal by battle on an appeal no bar to indictment for same offense ib
- Indictment and conviction of felony without judgment of death, or prayer of clergy, no bar of a new indictment, nor is *auterfoits acquit* by verdict, unless judgment given ii. 248, 251
- Auterfoits convict and clergy had* a good bar to indictment or appeal for same crime ii. 220, 250, 251
- And so it is if he pray his clergy, and court advise upon it, tho clergy not actually allowed ii. 251, 390
- Auterfoits attain de mesme felony*, tho on insufficient indictment, was at common law a bar to appeals, as well as indictments of same offense, and so remains, except in appeals of death ii. 251
- If *A.* be indicted of piracy, and hath judgment of *peine fort & dure*, and by a general pardon piracies are excepted, but judgment of *peine fort & dure* is pardoned by general words of all contempts, *quære*, whether, if he may be arraigned for same piracy, but he may be arraigned of

CONTAINED IN THE TWO PARTS.

- of any other piracy committed before that award ii. Page 252
- If *A.* be attaint of treason, &c. by outlawry, he shall not be indicted or appealed of same felony till outlawry reversed ib
- One indicted at common law of felony, and having judgment of death, yet may *nient obstante* his attainder, be arraigned for treason committed before the felony; but *quære* as to treason committed after it ib
- Where one is appealed of robberies committed on divers persons and they bring several appeals, and he is attaint at suit of one, yet he shall be put to answer to appeals of the others ib
- If there be an indictment and attainder at the prosecution of one, *quære*, whether after he may not be arraigned on an indictment at prosecution of another to have restitution on the statute 545. ii. 252
- One commits several felonies, and is attaint of one, and *king* pardons that attainder and the felony for which he was attaint, if after indicted or appealed for same felony, he may plead his attainder, and no good replication to say, he was pardoned after ii. 253
- But yet may be indicted or appealed for the other felonies; and if he plead his former attainder, it may be replied that he was pardoned after, whereby he is restored to be a person able to answer those offenses ib
- If one attaint commit a felony after, and be pardoned the first felony and attainder, he shall be put to answer the new felony ib
- If one commit several felonies, and be convict of one, but no judgment of death, nor clergy given him, he may be indicted for all the former felonies ib
- If one had been convict of any one felony, and prayed his clergy, and read, and had been delivered to the ordinary, formerly he should never have been arraigned for any of the former felonies ii. Page 253
- For any felony done after conviction, and clergy allowed, he may be indicted; but not if he stand attaint and unpardoned ib
- Now by statute clergy dischargeth all offenses precedent within clergy, but not such other offenses as are ousted of it ii. 254
- Accessory on arraignment may plead acquittal of principal ib
- Gaoler arraigned for voluntary escape of a prisoner for felony may plead acquittal of felon of principal felony, and so may rescuer arraigned on indictment for rescue of a felon 611, 612. ii. 254
- Felon acquitted of first felony shall not be arraigned of breach of prison, or if indicted of it before acquittal, and then is acquitted of principal felony, he may plead it in bar to indictment for breach of prison 611, 612. ii. 224, 254, 255
- He who pleads *auterfoits acquit, convict or attaint* must plead it specially setting forth record ii. 255
- He must either shew record *sub pede sigilli*, or have record removed into court, where it is pleaded, by *certiorari*, or if it be record of same court, must vouch term, year and roll, for record is part of his plea ib
- He must make averments, as case shall require, that he is same person, and it same offense ib
- No issue shall be taken on plea of *nul tiel record*, because pleaded in court, but *king's* attorney may have *oyer* of record ib
- The averments are issuable ib
- If issue taken on them, they shall be tried by jury, that is returned to try prisoner, by 22 H. 8. ib
- He that pleads these pleas, must plead over *not guilty* to the felony, for if the pleas be adjudged against

A TABLE OF THE PRINCIPAL MATTERS

- against him, yet he shall be tried on *not guilty* ii. Page 255, 256
- Where one may plead to jurisdiction of court without answering to the felony ii. 256
- If one by plea confess the fact, he need not answer to the felony, but he may in that case, if he will, plead over to the felony ib
- If one be indicted or appealed of felony, and he will demur to the appeal or indictment, and it be adjudged against him, he shall be hanged, for it is a confession of the indictment; he may take all exceptions to indictment or appeal, as might have been taken on demurrer, either before his plea, or in arrest of judgment ii. 257
- In case of demurrer no judgment of *peine fort & dure* can be given ib
- Plea to the felony consists of *not guilty*, (whereto clerk joins issue *cul. prist.*) and the putting himself on his country ib
- If either of these fail, it is in law standing mute, either in treason or felony ii. 258
- In treason or felony there can be no justification, as *se defendendo*, &c. ib
- But on *not guilty* he shall have the advantage of all such defenses ib
- If duress and compulsion from others, &c. will excuse him, jury on the general issue ought to find accordingly ii. 258, 259
- Where matter appears not to be felony, prisoner on *not guilty pleaded* may be acquitted ii. 303, 304
- Where party is convicted *within being burnt in the hand*, plea of *auterfoits acquit*, and had his clergy, as good a plea as before 18 Eliz. ii. 390
- If prisoner plead a pardon, how it concludes, and what judgment entered ii. 391, 392
- What conclusion of plea of *auterfoits acquit*, or *convict*, or *attaint de mesme felony*; most commonly prisoner pleads over *not guilty* ii. Page 238, 248, 255, 256, 392
- How such plea is confessed by king's attorney, or coroner ib
- If one plead in bar to the indictment, yet if indictment insufficient, whether *eat sine die*, shall be applied to insufficiency of indictment, or plea in bar ii. 393, 394
- Reasonable to have the *eat sine die* special in that case, and how ii. 393
- If entry of judgment of acquittal be *quod eat inde quietus*, prisoner cannot be arraigned again, tho indictment insufficient ii. 394, 395
- One indicted of murder or manslaughter, on *not guilty* the special matter is found, or jury acquits him, judgment is *quod eat inde quietus*, it is a perpetual bar; so, if found guilty *se defendendo*, judgment is *quod expectet gratiam regis* ii. 395
- For pleas in abatement. Vide Abatement.
- Vide Judgments.
- Polygamy.
- 1 Jac. Bigamy, or [rather] Polygamy felony within clergy 692
- Cases excepted out of the act ib
- Difference, where first wife married *beyond sea*, and second *here*, and *de converso* 692, 693
- A feme takes baron in Holland, and during his life marries another there, then true husband dies, she (second living) marries a third *here*, *dehors* the act 693
- But if, living first, she had married third in England, felony within it ib
- Where notice of party's being alive necessary, or not ib
- What *beyond seas*, and what *within king's dominions*, *quoad* this act ib
- Having

CONTAINED IN THE TWO PARTS.

Having two wives, one of which is divorced *a mensâ & thoro* not within it; if divorced *causâ sævitæ*, whether within it Page 694

Where divorce *a vinculo matrimonii*, either party without proviso in *aet* may freely marry ib

If wife be divorced from the husband *causâ adulterii vel sævitæ*, *vinculum matrimonii* not dissolved; but *contra*, if divorced *causâ consanguinitatis vel præcontractus* 124, 381

Where divorce *à vinculo*, and one appeals marriage pending appeal, *dehors* the *aet*; *contra*, if sentence of divorce repealed 694

If either within age of consent, second marriage not within *aet*; but *contra*, if *feme* of twelve, and man of fourteen ib

Trial directed to be where party taken; he may be indicted, where second marriage was, tho never taken 694, 695, 705

Marriage to a former husband, second being alive, simply void 693

Pope. Vide Religion.

Præmunire.

1 Mar. repeals all *præmunires* enacted in or after 1 H. 8. 308

Vide Religion.

Prerogative. Vide King.

Prescription.

Why *deadlands*, goods of felons of themselves, felons and outlaws cannot be claimed by prescription 419

Presentment.

A more comprehensive term than indictment ii. 152, 153

Some presentments of themselves convictions and not traversable, others not so, but in nature of informations, and therefore traversable ii. Page 153, 154, 155

Presentment of a *felo de se* before justices of peace, or *over and terminer*, traversable by the executor ii. 154

Why coroner's inquest of a *fugam fecit* is conclusive, and not that of grand inquest, or petit jury ib

If party be presented to have suffered an escape, because at least he is to be fined, he shall have his traverse to it ib

But if escape be presented upon a vill, it is not traversable, and why 603. ii. 154

Indictment against city of London for an escape traversable ii. 154, 155

A presentment of a riot, or forceable detainer by a justice, or two justices of peace is a conviction by *stat.* ii. 155

Presentment of justices of peace of default in repairs of an highway, traversable ib

Inquests must be returned to be *probi & legales homines de comitatu prædicto* ii. 167

For presentments before coroner.

Vide Coroner.

Vide Inquest of Office.

Priest. Vide Clergy, Felony by Statute, Religion.

Principal and Accessary.

Who shall be said principals in felony in the first and second degree 233, 437, 615

Accessaries *before* and *after* described 233, 613, 615, 618

In treason no accessaries but all principals, so procurer *before*, or a knowing receiver *after*; but whether a knowing receiver of a counterfeiter of the great, or privy seal, or the coin be a principal in treason 234, 237, 613

Whether

A TABLE OF THE PRINCIPAL MATTERS

- Whether receipt of a felon after attainder in same county makes an accessory *without notice* Page 323, 622
- Consenting to a felony makes a man principal or accessory, bare concealing, only misprision 374
- If servant or wife be of confederacy to kill the husband or master, and be in same house where he is killed, tho not in same room, they are principals, and guilty of petit treason, for it is a presence; and so in other cases 379, 439
- There are principals and accessories both *before* and *after* in petit treason 381
- If one take poison by persuasion, but in absence of another, and die of it, persuader is principal in murder 431
- Counselling, commanding, or directing killing a man, if he that counsels, &c. be absent, makes him accessory *before* to the murder 435
- In case of poisoning, he that counsels another to give poison, if he doth it, he, who counsels it, if absent, but accessory *before* 435, 615
- He, who lays, or gives poison, tho absent when taken, is a principal ib
- If *A.* command *B.* to beat *C.* and he beat him to death, murder in *B.* and if *A.* be present, murder in him also; if absent, he is accessory ib
- If *A.* counsels *B.* to poison his wife, *B.* obtains poison from *A.* and gives it his wife, who ignorantly gives it to a child, this is murder in *B.* but *A.* who was absent, is not accessory to the murder, because the command shall be construed strictly 436
- If *A.* counsel *B.* to beat *C.* with a small wand, if *B.* beat him to death with a great club, *A.* is not accessory ib
- If *A.* counsel *B.* to kill *C.* and before the fact done countermands it, if *B.* does it afterwards, it is murder in *B.* but *A.* not accessory Page 436, 452
- In manslaughter there can be no accessories *before*, nor in homicide *se defendendo* 437, 459
- If *A.* be indicted of murder, and *B.* as accessory *before* by procurement, and *A.* be found guilty only of manslaughter, *B.* shall be discharged ib
- All present and assisting to murder, principals ib
- In *burglary* or robbery, those who watch at lane's end, &c. tho not actually present, burglars, or robbers 439, 534, 537, 555, 563
- Otherwise on 39 *Eliz.* that *act* binds up exclusion of clergy to stealing in the house 537
- Persons ready to aid, tho but lookers on, principals ib
- Divers come with one assent to do mischief, as to kill, rob, beat, &c. and in execution thereof one commits murder, all principals 440, 441
- Divers aiming to rob a person charge him with felony, one robs him, robbery in all; but without such intent, rest not guilty ib
- If *A.* comes in company with *B.* to beat *C.* and *B.* beat him so that he dies, *A.* is principal ib
- Several rioters in a house, some issue out and murder one within view, who came to constable's assistance, all within the house who abetted the assault, principals 463
- 1 *Jac.* ousts none of clergy but him who stabs, not even persons present and assisting 468
- Where principal agent shall be excused from felony, and principal in second degree be guilty 514
- All that come in company to rob, principals, tho one only do it 533
- Where one may be principal in robbery, tho neither actually present at the assault, nor robbery,

CONTAINED IN THE TWO PARTS.

- bery, nor assenting thereto
Page 534, 537, 538,
 In *afts* making felony accessaries
before and *after* implied 613,
 614, 615, 632, 644, 704
 Whether *aft* making offense felony
 in offenders, their counsellors,
 procurers and abettors, and
 being silent as to accessaries
after, extends not to accessaries
after 704
 In treason, whether principal in
 first degree shall be tried be-
 fore those in second degree
 613. ii. 223
 In cases criminal, not capital, no
 accessaries 530, 613, 616, 618
 Accessaries *after* to crimes not ca-
 pital by receiving offenders can-
 not be in law under any penal-
 ties as accessaries, unless the *afts*
 inducing the penalties extend
 to receivers, or comforters, as
 some do 613
 Maintainers in certain *afts* denote
 maintainers of offense, and not
 parties ib
 Where an *aft* makes a felony, it
 incidently makes such accessaries
 as would be accessaries *before* or
after to a felony at common
 law, but the special penning
 sometimes varies the case 613,
 614, 615, 632
 But if the *aft* express accessaries
before and not *after*, there can
 be no accessaries *after* 614
 Accessaries *after* an offense of a
 lower degree than accessaries
before 614, 615
 Procurers, counsellors and abettors
 import accessaries *before* 614
 Receivers or comforters accessaries
after ib
 In offenses unpremeditated no ac-
 cessaries *before*, as *per infortu-*
nium, &c. 615, 616
 Words of bare permission make
 not an accessory 616
 All present, when poison infused,
 principals; but hiring another
 to do it, without being present,
 makes him only accessory ib
 Vol. II.
 Buying materials of poison makes
 party only accessory *Page* 616
 Where the execution varies from
 the command in person slain, or
 in nature of offense, commander
 is not accessory; *contra*, where
 offense is only varied in degree
 617
A. gets *B.* with child, and before
 the birth counsels *B.* to kill it,
 child is born, *B.* murders it, *A.*
 accessory ib
 Where the instrument, as a mad-
 man, or wild beast cannot be a
 principal, party, tho absent, is
 principal ib
A. commands *B.* to kill *C.* and
 before the fact repents and coun-
 termands it, yet *B.* kills him,
A. not accessory; *contra*, if he
 had not countermanded it 618
A. knows *B.* hath committed a
 felony, but conceals it, not fe-
 lony, but misprision ib
A. sees *B.* commit a felony, but
 consents not, nor takes care to
 apprehend him, not accessory,
 but finable ib
A. knowingly suffers a felon in his
 house to escape before arrest,
 not accessory; but *contra*, if cor-
 rupted by money 619
 So if he shut fore-door, and de-
 ceive pursuers, this being an
aft, and not bare omission, he
 is accessory ib
A. hath his goods stolen by *B.* if
A. receives his goods without
 any contract to favour him, it is
 lawful; but otherwise theft-bote,
 but yet *A.* not accessory ib
 Where receipt of stolen goods [*be-*
fore 3 & 4 *W. & M. &c.*]
 made an accessory, or not 619,
 620. ii. 150
 Relieving a traitor or felon in pri-
 son or bailed out, makes not an
 accessory 620, 621
 Conveying instruments to a felon
 to break prison, or bribing gao-
 ler to suffer an escape makes an
 accessory 621
 K k Writing

A TABLE OF THE PRINCIPAL MATTERS

Writing in favour of a felon for his deliverance, or instructing him to read to save him by his clergy makes not party an accessory Page 621

If *A.* be committed for felony, and *B.* an attorney, advise the friends of *A.* to write to the witnesses not to appear against him, who writes accordingly, this makes neither *B.* nor the friends accessory, but punishable, and how ib

A husband receiving the wife may be an accessory, but not wife for receiving the husband ib

If the wife alone, without his privacy, receive a felon, she only accessory ib

If they jointly receive a felon, it is only the act of the husband ib

Accessory cannot be, unless felony committed; *A.* wounds *B.* dangerously, *C.* receives *A.* then dies, *C.* not accessory 622

One may be accessory to an accessory by receiving him, knowing him to be an accessory to felony ib

No accessory in receipt of a felon, without knowing that the party hath committed a felony ib

Accessory may be indicted with principal, or severally 623. ii. 223

An accessory *before* or *after* in another county, than were principal felony committed, punishable at common law ib

By 2 & 3 *E.* 6. accessory indictable in county where accessory, and to be tried there; this *act* gives no power to justices of peace 623. ii. 44

Justices before whom foreign accessory is, shall write to those before whom principal is attaint, for record of attainder, and how the writ is to be 623

Process of outlawry must stay against accessory till principal attaint 623. ii. 200

Accessory shall not answer till principal be tried, but otherwise, if

he will wave benefit of the law

Page 623. ii. 200

But if he wave it, necessary to respite judgment till principal be convict and attaint, for if principal be after acquit, conviction of accessory annulled; but if acquit of the accessory, acquittal good 624. ii. 224

If he be indicted as accessory to three, he shall not be arraigned till all the principals be attaint or outlawed; but if he be indicted as accessory to one of them only, if that one be attaint, tho the others be not, he shall be arraigned 624. ii. 200, 201

But the court may, if he be indicted as accessory to three, arraign him only as accessory to the party attaint, and if acquit of that, he may be arraigned *de novo* as accessory to the other two 624. ii. 200, 201

Best to respite arraignment of accessory till all principals appear, or be outlawed ib

If principal and accessory appear, and plead together, they may be tried by same inquest; but principal must be first convict and attaint, and how jury to be charged 624. ii. 223

If principal plead in bar, or abatement, accessory not to answer till plea determined; if plea maintained, accessory discharged, if over ruled, principal shall plead over to felony, and may be acquitted ib

If *A.* be attaint of murder on an appeal, and then *A.* is indicted of murder as principal, and *B.* as accessory, principal pleads former attainder, *B.* shall not be put to answer as accessory, because he is not attaint upon same suit; and so it is, if attainder of *A.* were first on the appeal 625

If principal was acquit, or convict, and had his clergy, a pardon, &c. accessory should not [before 1 *Annæ*] have been arraigned; *contra,*

CONTAINED IN THE TWO PARTS.

contra, if after attainder Page 598
625

If principal be erroneously attaint,
accessary shall be arraigned, but
principal reversing his attainder,
reverseth also attainder of acces-
sary 625

One acquit as principal cannot be
indicted as accessary *before*, but
acquit as accessary *before* or *after*
may be arraigned as principal
625, 626. ii. 244

But one acquit as principal or ac-
cessary *before* may be indicted as
accessary *after* 626. ii. 244

Accessary to crimes within 28 H. 8.
of trial of treasons, &c. upon the
high sea, not punishable there-
by, but by the *marine law*.
ii. 17, 18

Principal in murder in second de-
gree, may be arraigned and tried
before principal in first degree
437. ii. 223

Lately accessary, if he appear, hath
been arraigned and put to plead,
but process against inquest and
trial ceaseth, till principal come
in, or be attaint by outlawry
ii. 224

Accessary may pray process against
principal, and therefore, if ac-
cessary acquitted before princi-
pal tried, it is a good acquittal;
and if convict, a good convic-
tion; but no judgment shall be
given on conviction, till princi-
pal tried ib

If *A.* be arrested, or in prison for
felony, and *B.* rescue him, or
the gaoler suffer a voluntary e-
scape, tho they may be presently
indicted; yet they shall not be
arraigned till *A.* be convict, or
attaint by judgment, or outlaw-
ed; for if *A.* be acquitted on
the indictment, the rescuer, or
gaoler shall be discharged 237,
238, 591, 598. ii. 224

How far a wife may be accessary to
her husbands treason, or felony.
Vide *Coverture*.

Prison. Vide *Arrest, Breach*
of Prison, Commitment,
Escape, Gaol, &c.

Privilege. Vide *Habeas Cor-*
pus.

Procedendo. Vide *Certiorari.*

Process.

Regularly no process issues in *king's*
name to take a felon, unless on
indictment, or matter of record
in court Page 575, 576. ii. 113

Of the writ *de securitate pacis*
51, 52

In all cases *king's* writs directed to
sheriff, which he executes *per se*,
or by his warrant to his bailiffs
577

Sheriffs or bailiffs may require
any one to assist in the execu-
tion ib

If above two coroners in a county,
and a writ is directed *coronatori-*
bus, tho one dies, whilst plural
number remains, a return by the
coroners is good; but if only
one survivor, he cannot execute
and return it till another made
ii. 56.

But if two coroners in a county, or
more, one may execute the writ,
as in case of an *exigent*, but re-
turn must be in name of *corona-*
tores ib

Coroner on appeal in his county
may issue process to take ap-
pellee ii. 68

But if only a coroner of a franchise,
whether he may make precept
to sheriff to attach him ib

He cannot make precept to bailiff
of a franchise, because bailiff of
a franchise cannot execute pro-
cess within it but by sheriff's
mandate ib

Process after indictment issued from
a sessions of the peace is always
in *king's* name ii. 113

A TABLE OF THE PRINCIPAL MATTERS

On indictment or information preferred on a penal law, *capias* not first process, but *venire fac.* and *distringas*, and in cases of information no process of outlawry at all till 21 *fac.* ii. Page 113
Superfedeas on a prohibition issues from *chancery* in vacation, from *B. R.* in term ii. 147
 Of the writ *de odio & atia*; its different names ii. 148
 Why refused ib
 Party to be bailed by twelve persons ib
 Tho indictments be not discontinued by demise of the *king*; in some cases process are ii. 189, 209
 In indictments of trespass *venire fac.* first process, and when *non est inventus* is returned, *cap.* and *exigent* ii. 194
 All process on an indictment, and generally all process for the *king* are with a *non omittas*, &c. 577. ii. 224
 By virtue thereof sheriff may enter into any liberty to execute the same ii. 224
 If party be in his own house, or in the house of another, and doors be shut, and sheriff having given notice of his process demand admittance, and the doors be not opened, he may break open the doors, and enter to take the offender ib
For jury process. Vide *Trial.*
For process in outlawry. Vide *Outlawry.*
For warrants. Vide *Arrest, Justices of Peace.*
 Vide *Certiorari, Habeas Corpus.*

Property.

One hath a property *ratione loci privilegii & impotentiae*, in young beasts and birds *feræ naturæ* in his park 511
 A lodger hath a special property in his chamber 554

Artificial accessions by *adjunction, commixtion, and specification* Page 513
 Vide *Burglary, Indictment, Larceny, &c.*

Purveyors. Vide *Felony by Statute.*

Queen.

A QUEEN regent, who is married, holds her sovereignty as intirely as if she were sole 106
Who shall be said a queen within 35 E. 3 de proditionibus. Vide *Treason.*

Rape.

FELONY at common law, then by statute made by misdemeanor, and by 13 *E. 1.* felony again 627, 632
 How antiently punished; but it was in the woman's power to save ravisher by marriage 627
 Not inquirable in a *Leet* or *Turn* 627, 632. ii. 69
 Rape defined 628
 Carnal knowledge of a girl under ten, felony without clergy, by 18 *Eliz.* 630
 If above ten, and under twelve (*deins* age of consent to marriage) tho she consent, it is a rape 631
Debet esse penetratio, as well as *emissio* 628
 Least penetration *absque emissione* makes it a rape ib
 An aider a ravisher ib
 Keeping a woman as concubine before the rape, antiently a good exception, and now may be evidence of assent ib
 Husband cannot commit it on his wife 629
 But aiding another to commit it upon her, indictable as a rape, tho wife cannot have appeal of it against her husband ib

Wife

CONTAINED IN THE TWO PARTS.

Wife in such a case may be a witness against her husband *Page*
629

Infant under fourteen presumed *incapax*, tho he may be principal in aiding, &c. 630

Consent on menace of death excuseth not 631

Mulier vi oppressa concipere potest ib

Subsequent consent not extorted creates a bar of her appeal, but ravisher indictable 632

In such case who shall have the appeal 631, 632

What forfeitures the ravisher and ravished assenting incur by statute 631

There may be accessaries *before* and *after* 632

Fresh discovery and pursuit necessary on part of ravished 632, 633

Year and day not allowed for bringing appeal, but it is in discretion of court 633

Principals ousted of clergy, but not accessaries *before* or *after* ib

What necessary concurring evidence to confirm that of the ravished 633, 634, 635

Where an infant ravished shall be heard without oath 634, 635

Accusation of a rape easily made, hard to be proved, and harder to be defended by the accused, tho never so innocent, and many instances thereof 635, 636.
ii. 290

Realm.

Realm of *England* comprehends the narrow seas, *invading king's* ships in the same, *levying war* *en son realm* within 25 *E.* 3. 154

Ireland, tho part of dominions of this crown, yet no part of the realm of *England*, nor *infra quatuor maria* 155

The like [formerly] of *Scotland*, even while it was under the power of the crown of *England*, as in sometimes of *E.* 1. and *E.* 3. ib

Isles of *Man*, *Jersey*, *Guernsey*, &c. tho parcel of dominions of this crown, for what purpose they are not within the realm *Page*
156

For trial of foreign treasons, and of an offense made felony by statute, consisting partly in the realm, partly out. *Vide County.*

What shall be said beyond seas, and what within king's dominions with respect to 1 *Jac.* of bigamy. *Vide Polygamy.*

Vide Ireland.

Receiver.

Whether receipt of a felon after attainder in same county, makes an accessary *sans* notice 323, 622

Vide Forcible Marriage, Principal and Accessary, &c.

Recognizance. *Vide Bail, Justice of Peace.*

Record.

A judge fined for raising a record 646

On *Westm.* 1. an attorney, imprisoned for a year and a day, and banished the court *C. B.* for embezzling part of a record 647

If a clerk had made a misentry of record, the judge of the court might *ore tenus* have rectified it, tho sometime after ib

A judge of record is *quasi* a living record, and controuls the entry of the clerk ib

King's title being of record must be avoided by record ii. 205

Judgment of record to be avoided by record ii. 207

Acquittal generally a warrant for entry of the judgment at any time after ii. 243

By 8 *H.* 6. *stealing, carrying away, or avoiding records*, felony, clergy allowed 645, 646, 653

A TABLE OF THE PRINCIPAL MATTERS

Felony in principals and accessaries <i>before</i>	Page 645, 646	Bail taken, but not filed, not within this <i>act</i> , [but since made felony]	Page 696
Exposition on this <i>act</i>	645 to 653	How record of acquittal or conviction shall be pleaded, shewn forth, or certified upon plea of <i>autrefois</i> acquit, &c. and where nul tiel record pleadable, or not. Vide <i>Plea</i> .	
Punishment of this offense before the <i>act</i>	646 to 649	Vide Amendment, Chancery, Certiorari.	
If judgment thereby be reversible, tho not reversed, it is within the <i>act</i>	650	Recusant. Vide Religion.	
What records are within it	649, 650	Relation. Vide <i>Felo de se</i> , Forfeiture, &c.	
No difference, whether judgment be in a criminal or civil case, or whether reversible by error or plea	650	Religion.	
If it be in affirmance of judgment, punishable as a misdemeanor, but not felony	650, 651	Heresy in common speech comprehended <i>apostacy</i> , <i>witchcraft</i> , and <i>formal heresy</i>	383
But if <i>A.</i> be sued by original to <i>exigent</i> and outlawed, and afterwards <i>exigent</i> is made <i>B.</i> by one man, and original the same by another, felony in him who raised <i>original</i> , and in him also who raised <i>exigent</i>	651	<i>Apostacy</i> defined	ib
If this offense arise in two counties, punishable as felony, but punishable as misprision in either	651, 652, 653	What the punishment of it by the old laws <i>here</i> , and by the imperial laws	ib
Justices of either bench enabled to hear and determine it, and <i>C.</i> <i>B.</i> has conusance, tho offense in record of <i>B. R.</i>	651	Soliciting others to <i>apostacy</i> most penal	ib
Trial to be by party-jury of clerks and others	ib	Witchcraft antiently punished by writ <i>de hæretico comburendo</i>	ib
<i>C. B.</i> may take indictments thereof	ib	Heresy variously defined	383, 384
Indictment may be taken by clerks alone, or foreigners alone, or both; but trial to be by party-jury only	ib	The definition of the papal canonists makes the smallest deviation from them <i>heresy</i>	ib
In what county to be tried	652	Who the judge of <i>heresy</i> according to the common and imperial law	384, 385
Where by special commission	ib	The solemnity that accompanied the degradation of one in orders	384, 385, 389
Where indictment removable in <i>B. R.</i>	ib	<i>Inquisitors</i> thereunto deputed by the pope, or ordinary	384, 385
If offense committed in <i>London</i> , mayor not to be named in commission	ib	<i>Heretics</i> distinguished into several ranks	385
1 Jac. acknowledging fine, recovery, deed inrolled, statute or recognizance, bail or judgment in name of another not privy to same, felony, clergy ousted, but no corruption of blood, or loss of dower	696	A simple heretic defined	ib
		Dismissed on abjuring specially the particular opinion, or generally all heretical opinions	ib
		The latter abjuration required of those, that were <i>graviter suspecti</i>	385, 386
		Who	

CONTAINED IN THE TWO PARTS.

- Who shall be said *hæreticus contumax* Page 386
- Who a *relapsed heretic* ib
- If after conviction heretic abjured his opinion, his life was saved; but if he relapsed after abjuration, then delivered over to secular power; no suspension of sentence 386, 387
- By civil and canon law convicting and sentencing heretics were left to the ecclesiastical judge, without which civil jurisdiction could not punish 387
- Several penalties consequential on sentence of *heresy* ib
- Whence burning all heretics indistinctly, if pertinacious or relapsed, took its rise 388
- Penalties by canon law go no further than ecclesiastical censures, and what these are ib
- Secular power made the minister in execution of heretics 389
- Princes were not suffered to shew any courtesy to heretics ib
- When sentence given by the ordinary, he was delivered over to the lay officer, and then a mandate issued from chief magistrate to execute offender ib
- Reflections on the miserable servitude of christians under the papal hierarchy 389, 390
- How the law and usage obtained here touching heretics before R. 2. 390 to 396
- Fitzherbert* mistaken in saying, that the writ *de hæretico comburendo* issued only in case of a relapse 394
- Death rarely inflicted on heretics before R. 2. ib
- Quo jure* goods forfeit for heresy before 2 H. 5. ib
- Of *heresy* in the times of R. 2. H. 4. H. 5. and so to 25 H. 8. 395 to 402
- The power of the diocesan touching *heresy* by 2 H. 4. and an exposition thereon 395 to 400, 409, 410
- Temporal judge might incidently have taken notice, whether a *tenet* was heresy or not, and the diocesan had so certified, temporal judge might have delivered party imprisoned on *habeas corpus*, and false imprisonment lay against party detaining him Page 400, 407, 408
- Exposition on 2 H. 7. against *heretics* and *Lollards* 401
- What the method of proceeding, and how the law touching heretics and their punishment stood from 25 H. 8. until first of *Eliz.* and from that time to the time the author wrote 401 to 411
- 1 *Eliz.* defines heresy 408, 409
- Exposition on that act 404 to 411
- It set first boundary to heresy 406
- Significavit* of conviction ought to have contained (even at common law) the particular heresy, without it no writ *de hæretico comburendo* ought to have issued 407, 408
- Whether conviction of heretics was practised in queen *Elizabeth's* time 405
- 9 Jac. two men convicted of *Arianism* before the diocesan burnt by writ *de hæretico comburendo* ib
- [This writ is taken away by 29 Car. 2. *heresy* how punishable at this time; vide in notis] 410
- Great privileges granted to the clergy by antient kings and states ii. 323, 324
- In some kingdoms double supreme power; *regnum ecclesiasticum & seculare*; former only dependent on the pope, the latter subordinate to the former, so *regnum sub graviore regno* ii. 324
- The original of sanctuary, and original and progress of *privilegium clericale* ii. 323 to 330
- The clergy claimed their privileges *jure divino* ii. 323, 324
- Sanctuary ousted by statute 605
- Supremacy of king in matters ecclesiastical, a most unquestionable right of the crown 75
- Of the papal encroachments thereon, and also on his sovereignty in matters civil under pretence

A TABLE OF THE PRINCIPAL MATTERS

<i>of in ordine ad spiritualia</i>		<i>Aiders and maintainers of offenders</i>
	Page 76	within 23 Eliz. and concealers
<i>Bringing in pope's bulls against com-</i>		of such offenses, how punished
<i>mon law, and sometimes antient-</i>		Page 333
<i>ly punished as treason</i>	643	By 27 Eliz. where a subject, not
<i>Felony by 13 R. 2.</i>	ib	<i>being a jesuit, educated in a fa-</i>
<i>By 13 Eliz. the offense as well in</i>		<i>reign seminary, and not returning</i>
<i>the bringers in of these bulls, &c.</i>		<i>after proclamation, or a popish</i>
<i>as executors thereof, treason as</i>		<i>priest coming into the realm shall</i>
<i>well in ecclesiastics as laymen</i>	ib	<i>be guilty of treason</i>
<i>By 35 Eliz. penalty of dissuading</i>		336
<i>from church, holding of conventi-</i>		<i>Receiving of such popish priest know-</i>
<i>cles</i>	688, 689, 690	<i>ingly, felony sans clergy</i>
<i>Non-conformity within three months</i>		336,
<i>after conviction, party shall ab-</i>		615, 688
<i>jure the realm</i>	ib	<i>Sending relief to a seminary, a præ-</i>
<i>Not departing, or returning, felony</i>		<i>munire</i>
<i>without clergy</i>	ib	336
<i>Submitting discharged of the pe-</i>		<i>Concealers of such priests, how</i>
<i>nalty of this act</i>	ib	<i>punished</i>
<i>Relapsing loseth benefit of the sub-</i>		337
<i>mission</i>	ib	<i>Justice of peace, to whom disco-</i>
<i>Penalty for retaining or relieving</i>		<i>very made, not informing one</i>
<i>recusant after notice</i>	ib	<i>of the privy council, &c. shall</i>
<i>Exposition on this act</i>	ib	<i>forfeit 200 marks</i>
<i>Circumstances necessary to be al-</i>		ib
<i>ledged and proved</i>	ib	25 Eliz. a suspected jesuit or priest,
<i>By 35 Eliz. popish recusant refusing</i>		<i>refusing to answer directly, to be</i>
<i>to abjure, or after abjuration to</i>		<i>imprisoned, till he shall make</i>
<i>depart felony without clergy</i>	690	<i>direct answer</i>
<i>Not to remove five miles from Lon-</i>		ib
<i>don</i>	ib	
<i>By 1 Eliz. against maintaining any</i>		Vide Clergy, Imprison.
<i>foreign ecclesiastical authority</i>		
<i>within these realms, first offense</i>		Reprieve. Vide Execution and
<i>forfeiture of goods, &c. second</i>		Reprieve.
<i>incurs penalty of præmunire,</i>		
<i>third treason</i>	329, 330	Rescue.
<i>Exposition on this act</i>	330	
<i>By 5 Eliz. maintaining the authority</i>		Rescue of one taken on general
<i>of the pope made a præmunire the</i>		warrant to answer what shall be
<i>first time</i>	ib	objected, no cause being exprest,
<i>So refusing to take the oath of su-</i>		not felony
<i>premacv</i>	331	578, 609
<i>Second offense in both cases, trea-</i>		He who rescues a felon, may be
<i>son</i>	ib	indicted, but shall not be ar-
<i>Exposition on this act</i>	331, 332	raigned till principal be convict
<i>By 23 Eliz. reconciling or being re-</i>		or attain
<i>conciled to the popish religion,</i>		598, 607. ii. 254
<i>where made treason; how in-</i>		Rescuer is quasi accessory, if prin-
<i>larged by 3 Jac. 333, 337, 338</i>		cipal be convict and not attain,
<i>Exposition on both these acts</i>	ib	but hath his clergy, or be ac-
<i>What the religion established with-</i>		quitted, rescuer shall not be put
<i>in 23 Eliz.</i>	333	to answer the rescue, but be dis-
		charged
		ii. 254
		If principal be found not guilty, or
		guilty of a crime not capital,
		rescuer ought to be discharged,
		but he may be fined for the res-
		cue
		599. ii. 254
		Tho

CONTAINED IN THE TWO PARTS.

The prisoner indicted of several felonies, yet the rescue makes but one Page 599

A man arrested on *mesne* process in carrying to gaol is rescued, the return of the rescue excuseth the sheriff; *contra* of an execution 601, 602

If a felon be attaint and carried to execution, and be rescued from the sheriff, sheriff is punishable, because he should have taken sufficient power with him 602

Hinderance of arrest of felon misdemeanor, but no felony 606

Where arrest of a felon lawful, rescue of him, felony ib

If in custody of a private man, notice that he is arrested for felony necessary to make it felony; *contra*, if in custody of an officer ib

Return of rescue of a felon against *A.* by sheriff not sufficient to put him to answer to it without indictment ib

If prisoner under custody be rescued or prison broke by strangers without his procurement, no felony in the prisoner, but felony in the strangers as a rescue; but if by his procurement, felony in him as a breach of prison ib

If party rescued be imprisoned for felony, and be rescued before indictment, what indictment must surmise; but if party be indicted and taken by a *cap.* and rescued, then there need only a recital that he was indicted *prout*, and taken and rescued 607

Vide Breach of Prison, Escape, Treason.

Restitution.

The several means of restitution of goods to party, from whom stolen 538

On appeal of robbery, &c. and conviction thereon, goods con-

tained in appeal were to be restored to appellant Page 538, 539

If he omit any in his appeal, they are confiscate 538, 545

If party brings appeal of robbery, &c. and it appears appellee came to the goods by bailment, &c. without felony, plaintiff forfeits his goods to the king for his false appeal 539

Where one steals goods of divers men severally, and one of them convicts offender on his appeal, before judgment rest may pursue their appeals ib

If judgment be given against *A.* on the appeal of *B.* yet if appeal of *C.* were begun before the attainder, *A.* shall be arraigned on appeal of *C.* because he is to have restitution of his goods thereby; second trial at suit of *C.* only in nature of an inquest of office to intitle him to restitution; whether the attainder be a bar to *C.* ib

But if *C.* doth not commence his appeal before *A.* is attaint, *A.* shall not be arraigned thereon; but if afterwards pardoned, he shall be arraigned at suit of *C.* but *contra*, if attainder were at king's suit ib

Where appellant shall have restitution 540

When he shall have restitution 540, 541

Of what things he shall have restitution 541

If felon waive goods stolen without any pursuit after him, they are not in law *bona waviatia*, nor forfeit; but *contra*, if he waive them on pursuit ib

This forfeiture not like a stray, where the lord may seize, yet owner may retake it within year and day; but here true owner cannot seize his own goods, tho on fresh suit within year and day, which is an expedient in the law to compel owner to prosecute his appeal ib

Of

A TABLE OF THE PRINCIPAL MATTERS

Of what things owner shall have restitution on 21 H. 8. he should have had restitution of on conviction in appeal at common law

Page 541

Before this *act* no restitution on indictment

542

This *act* speaking of *king's* subjects extends to aliens robbed

ib

If servant be robbed of master's money, and master or servant by procurement give evidence, and convict felon, master shall have a writ of restitution

ib

Restitution to be to party robbed, or owner

ib

If *A.* be robbed by *B.* and *C.* and *B.* only is convict of robbery by evidence of *A.* he shall have restitution

ib

If *A.* be robbed of an ox by *B.* who sells him to *C.* who keeps the money in his hands, and after kills the ox and sells it, or if the money be seized in the hands of the thief, *A.* may have a writ of restitution for the money

ib

So if money be stolen, and thief taken, he shall have restitution

ib

Testator robbed, thief convict on procurement of executor, he shall have restitution

ib

If goods be stolen, and by thief sold in market-overt, thief being convicted on evidence of party robbed, he shall have restitution on this *act* of thing sold

542 to 547

By 31 Eliz. notwithstanding sale of a horse in market-overt, owner may take him within six months after the felony on proof of his property, which shews that after six months he shall not have restitution

543

Scrivener's shop no market-overt [for plate] by custom of London

ib

By 31 Eliz. & 1 Jac. no sale of stolen goods in London, Westminster, or Southwark, or within two miles to a broker shall change the property

ib

Shops in London a market-overt [with respect to goods usually sold therein] Page 543, 544

Whether a sale in market-overt had barred restitution in appeal

544

A. commits a robbery, *king's* officer seizeth goods stolen, and sells them in market-overt, party robbed convicteth *A.* on his appeal, he shall have restitution if he made fresh suit

ib

If offender be convict on evidence of party robbed, or owner, he shall have restitution, tho there were no fresh suit, or any inquiry by inquest touching the same; but *contra* in appeal

545

Owner prefers indictment against the thief, who flies, and is thereon outlawed, owner shall have restitution

ib

Two persons have their several goods stolen, tho thief convicted on the prosecution of one of them, the other must prosecute his indictment in order to have restitution of his goods

545.

ii. 252

Antiently if *C.* was attaint on indictment preferred by *A.* and reprieved till another sessions, and then *B.* preferred indictment of another robbery committed on him by *C.* *C.* might if he would have pleaded to the countrey, and on conviction *B.* should have had restitution; but he might have pleaded *autrefois attaint*, and have refused to have answered, and then *B.* should have had no restitution; but by 21 H. 8. court ought to inquire by inquest of office touching robbery of *B.* and being ascertained thereby to grant restitution

545, 546. ii. 252

Restitution by course of law, either by taking his goods, or action

546

If *A.* steal goods of *B.* and *B.* take his goods of *A.* again to favour him, or maintain him, how punishable; but if he take them again without any such intent,

no

CONTAINED IN THE TWO PARTS.

no offense, but justifiable

Page 546

But after felon convicted, it can be no colour of crime to take his goods again, where he finds them, and why ib

A. steals 50 *l.* in money of *B.* *A.* is convicted and hath his clergy on prosecution of *B.* *B.* brings trover for it, and held it well lies; but *contra*, if before prosecution by indictment party robbed brings *trover*, or if plaintiff in former case had not given evidence on conviction 546, 547

A convict within clergy on being burnt in the hand, shall be restored to possession of his lands ii. 389

For restitution of blood, Vide Corruption and Restitution of Blood.

Return.

In temporal matters a general cause or return of heresy or criminalness, insufficient; *significavit* of conviction of heresy ought to contain particular heresy 407, 408

Insufficient cause of refusal, or non admission of a clerk, to alledge that he is *criminosus* & *non idoneus*, or that he is *schismaticus inveteratus* 407

Literal numbers allowed in returns, tho not indictments ii. 170

Vide *Certiorari*, *Habeas Corpus*, *Writ*, *Process*.

Right. Vide Forfeiture.

Riot.

Where one may assemble people to defend his house by lawful means, which he cannot do with regard to a journey 445, 487, 547

Where by common law and statutes, sheriff, justices of peace, &c. may raise a power to suppress and take rioters; and where if they disperse not on proclamation, and any of the rioters be killed, or maimed by justices, or those assembled by them to suppress the riot, it is justifiable Page 53, 293, 294, 495, 496

A presentment of a riot by a justice, or two justices of peace, as case shall require, is a conviction by several *acts* 155

Vide Arrest, Homicide, Justice of Peace, Murder and Manslaughter, Peace Officers, Treason.

River.

Thames is *alta via regia*, king's high stream 536

Robbery.

Defined 532
What ingredients in robbery ib
Something must be feloniously taken ib

A mere assault to rob without taking [till late *act*] only a misdemeanor ib

What a taking in law and fact 532, 533

If a thief compel true-man by fear to swear to fetch him money, which he doth, and thief receives it, robbery ib

If *A.* assaults *B.* and demands his purse, and *B.* delivers it, it is a taking, and so if *B.* refuse, and *A.* pray a loan or gift of money, which *B.* gives or lends, robbery 533

So if *B.* throws his purse in a bush, and *A.* takes it up, and carries it away, so if *B.* flying from thief let fall his hat, and thief takes it, and carries it away, all effect of same fear ib

If

A TABLE OF THE PRINCIPAL MATTERS

If a thief without weapon drawn bid party deliver his purse, which he doth, robbery, tho finding little in it he return it

Page 533

A.'s purse being fastened to his girdle, *B.* assaults him to rob him, and in struggling girdle breaks, and purse falls to the ground, no robbery; but if *B.* take up the purse, or if *B.* had purse in his hand, and then girdle breaks, and striving lets purse fall to the ground, and never takes it up again, robbery ib

Taking in the presence is taking from the person, but to constitute robbery it must be with putting in fear ib

Taking my cattle in my presence, and putting me in fear, robbery ib

Where one, neither in view, nor assenting, nor present at robbery or assault may be guilty of robbery 534, 537, 538

Where words of menace are used after taking and not before, larciny, not robbery 534

Tho thing taken be under 12*d.* value, felony *sans* clergy 536

But in foreign county petit larciny, for it is not robbery there ib

A. rides out with others with design to rob, he parts from his company, and pursues not his design, they afterwards commit a robbery, *A.* not guilty 537

If a robbery be committed before sun-rising, or after sun-set, whilst it is so far day-light that the face of a man is discernible thereby, Hundred chargeable 557

A. intending to rob *B.* breaks a hole in his house, *B.* for fear throws out his money, which *A.* takes and carries away, robbery 555

One indicted for robbery *in viâ regia*, or *in altâ viâ*, or *altâ viâ regia*, and convict, is ousted of clergy; *contra*, if *in viâ regia pedestri ducent*, &c. ii. 349

For robbing of houses. Vide divisions in titulo Burglary.

Vide Hue and Cry, Larciny.

Rogues. *Vide Felony by Statute.*

Sacrilege. *Vide Clergy.*

Sale in Market-obert. *Vide Restitution.*

Sanctuary. *Vide Religion.*

Scotland. *Vide Realm, Treason.*

Seal and Signet.

OF the great seal, and what things are passed under it Page 170, 171, 174, 175

Pes sigilli, or *le targe* explained, and the use of it 171

The use of the *privy seal* ib

Of the *privy signet* ib

Seals of *B. R. C. B. and exchequer*, *duchy and county palatine of Lancaster*, &c. by whom kept, in what manner, and by whom delivered 171, 172

When *king* dies, *great seal* continues till another made 176, 177

Proclamation *de sigillo amisso*, when either *king* or subject lost his seal casually 183, 184

King had power to dispose of lands belonging to the crown or *duchy* by letters patents under these respective seals [but how restrained at this time, *vide 1 Ann. Sess. 1. cap. 7.*] 278

Where counterfeiting old *great seal* is treason 77

What may be said a counterfeiting the *great or privy seal* 181 to 186

By 1 *M.* forging *queen's sign manual*, *privy signet* or *privy seal*, treason 178, 184

Antiently counterfeiting any of the *king's seals*, treason 179 to 184
lt

CONTAINED IN THE TWO PARTS.

It must be an actual counterfeiting
barely compassing, not treason
Page 181

Affixing a true great seal to another patent, a great misprision, but not treason 181 to 182

Fixing great seal by chancellor to a charter without warrant, no treason 183

Counterfeiting *king's* judicial seal for writs only a great misdemeanor, so of the seal of a statute merchant ib

What the judgment in counterfeiting great and privy seal, privy signet and sign manual 187, 351, 352. ii. 398, 399

Sedition.

In some old books treason exprest by that name, yet a charge of doing any thing seditiously amounts not to a charge of treason 77

Se defendendo. Vide Homicide.

Seizure.

Whether goods of an offender, and in what cases at common law might be seized on the offense committed, or inventoried and appraised only; in what cases and on what security they were to be delivered to the bailiff of party indicted, or to the constable or *villata* to be answerable for them, and in the last case, what maintenance the party and his family should have had out of them 364

If no indictment, then he who seized, did it at his own peril, no felony being committed ib

What regulations made therein by 5 & 25 E. 3. 364, 365

If party comes not in, his goods forfeit on award of *exigent*, which is awarded on the second cap.

returned *non est inventus*, as well in treason as felony, tho 25 E. 3. mentions only felony Page 365

Second cap. issues with a precept to seise offenders goods, out of which sheriff is to allow him and his family sufficient for their sustenance ib

Whether in case of such a seizure a sale for valuable consideration before conviction and after seizure binds the *king*, as in case of seizure and delivery to *villata* ib

1 R. 3. prohibits seizure of goods of a party imprisoned, tho indicted, but not convicted 365

Whether this *aet* extends to treason, tho not mentioned 366

Whether it extends to a party at large, whether indicted or not; it repeals not 25 E. 3. touching second cap. with a seizure of goods, as to other persons that are at large and not indicted, nor process made on their indictment, if they fly not, no seizure can be made, whether they be indicted or not ib

If a man be at large and fly for it by this *aet*, his goods cannot be seized and removed, whether he be indicted or not ib

If indicted and at large goods cannot be removed, but only viewed, appraised and inventoried where they lie ib

Tho they may not be removed, yet where party is at large, party removing not within penalty of double value ib

Nient obstante this *aet*, the use of seizing of goods of persons accused of felony, tho imprisoned or not imprisoned, prevails 366, 367

A true exposition of this *aet* 367

Vide Restitution.

Sessions. Vide Adjournment, Justice of Peace.

Sheriff.

A TABLE OF THE PRINCIPAL MATTERS

Sheriff.

Not to take notice in *pais* of appointment of a new sheriff

Page 499

Custody of a felon belongs to old sheriff till turned over by indenture

494, 495

Ought to deliver to commissioners of *gaol-delivery* the names of persons in prison, or let to bail to mainprize

ii. 36

Sheriff fineable for wilful or negligent escape in his gaoler, but not in gaolers of gaols, in particular franchises

595, 597, 598

His power to hold pleas of the crown taken away by *Magna Charta*

ii. 69

Yet afterwards had power to take indictments of felons

ii. 69, 87,

106

Such power either *virtute commissionis*, which is taken away by statute, or *virtute officii* in his *Turn*, which continues

ii. 69,

142

The *Turn* can take no indictment but of felony by common law, or of such matters, as are by statute limited to them, and therefore indictment of rape void there

ib

It is a court of record; who the judge there, and what the style of it

ii. 70

When it is to be held, if not held within the stated times, court held for that *Turn* only void

ib

Indictments by one *aet* must be under seal of the jury, by another *aet* indented

ii. 70, 152*

What freehold or copyhold indictors must have, otherwise sheriff punishable, and indictment voidable by plea

ib

He can make out no process on these indictments, but must send them to justices of peace, who have power to proceed thereon

ii. 70, 71, 106, 107, 142, 152*

But if original presentment not within jurisdiction of the *Turn*, justices of peace ought not to

proceed thereon, tho removed before them

ii. Page 71, 152

By common law he might issue a warrant for taking a felon before indictment

ii. 106

Where bailiff of franchise cannot execute process within his franchise, but by sheriff's mandate

ii. 68

Sign Manual.

By 1 Mar. *forging queen's sign manual*, treason

178, 184

Judgment in this treason

187

Si non omnes. Vide *Commission*.

Sodomy. Vide *Buggery*.

Soldier.

How soldiers were antiently retained

672, 673

Who bound to serve the king in his wars

675

Whether impressing them justifiable

678, 679

Etymology of *Prest*

677

Vide *Felony by Statute, Constable and Marshal*.

Stabbing. Vide *Clergy, Indictment, Murder and Manslaughter*.

Statutes in general, and their Exposition.

The *Westm.* 2. which gives imprisonment, where party in *assise* vouches a record and fails of it, is general, yet neither an infant, nor a *feme covert* in that case shall be imprisoned

20

General *aets*, that give corporal punishment, are not to extend to infants, therefore infant convict in ravishment of ward shall not be imprisoned, tho *aet* be general; but where a fact is made felony or treason, it extends as well to infants above four.

CONTAINED IN THE TWO PARTS.

- fourteen, as to others *Page* 21, 22
- 5 *Eliz.* & 18 *Eliz.* which require a conviction and attainder according to the order and course of law, these words include indictment as well as trial, yet the words *all trials of treason shall be according to the course of the common law*, as in 1 & 2 *P.* & *M.* include not indictment as well as trial 221, 298, 299
- 1 *Mar.* reducing all treasons to 25 *E. 3.* repeals not only treasons enacted *de novo*, but also declarative *aet*s 222, 260
- Some things enacted to be treasons by new and temporary laws, which were treason by 25 *E. 3.* 261, 262
- An *aet* for safety of king's person, &c. enacts an offense felony, or a misdemeanor (without a special clause) carries a presumption, that same was not treason before, and is a judgment of parliament in point 262
- Tho 1. *E. 6.* & 1. *M.* have taken away treasons of 11 *R. 2.* & 1 *H. 4.* yet they are so far of force as to damn the false and extrajudicial opinions of *Trefilian*, &c. 266
- Where an *aet* makes felony treason by the repeal of that *aet* it becomes felony again 291
- When an offense is made treason or felony by *aet*, and that *aet* is repealed; offenses committed before such repeal, and the proceedings thereon are discharged by such repeal, without a special clause in *aet* of repeal 291, 309
- Whether the two penalties previous to treason in case of words, viz for the first and second offense in 5 & 6 *E. 6.* be repealed by any *aet*, *quære* 296, 309, 310
- The manner of proceeding (in cases of treason) on a subsequent *aet* may be directed by a precedent *aet* 297. ii. 288
- Where the word *king* in an *aet* is personal, or includes his successors *Page* 101, 310, 318, 669, 706, 707, 708
- Where second offense is subjected to a severer punishment, there must be a conviction of the former, and judgment given thereupon 324, 685, 686, 705
- Preamble of an *aet* an estoppel, [and presumed to be true] 327
- Tho 25 *E. 3.* & 1 *R. 3.* mention only felony, yet they extend to treason, being *aet*s for advancement of justice 365, 366
- Aet*s speaking of fines or ransoms at king's pleasure mean of his justices 375
- Where commons assent to an *aet* is not exprest in parliament roll 397
- The words *hear and determine* in an *aet* import a trial by jury 403
- Interpretation of an *aet* (especially where a temporal interest is concerned) is of temporal cognizance 409
- Construction of many *aet*s touching matters of ecclesiastical cognizance belongs to the temporal judge ib
- Where *aet* speaking of king's subjects extends to aliens *here* 541, 542
- Where *maintainers* denote maintainers of offense, not of parties 613
- Procurers, counsellors, abettors* import accessories *before*, receivers or comforters *after* 614
- Where an *aet* makes an offense felony, it incidentally makes such accessories, as would be accessories *before* or *after* at common law, but the special penning sometimes varies the case 613, 614, 615, 632, 644, 704
- Eyt judgment de wy* & member create a felony, whereon ensue corruption of blood, eschete to the lord, and loss of dower 627, 641, 703
- Aet* mentioning inferior officers extends not to superior 649
- Where

A TABLE OF THE PRINCIPAL MATTERS

- Where *act*s making felony extended beyond the letter Page 632, 654. ii. 365
- Where *act* is repealed and re-enacted, or temporary, and expires, or is continued till end of next sessions, and before that is continued over, where it shall be said *contra formam statuti* or *statutorum*, or of which statute 667, 706. ii. 173
- Where one *act* relates to another, as where former makes offense, latter adds a penalty, how indictment to conclude ii. 173
- The several ways of providing that there shall be no corruption of blood, &c. 703
- But tho there be such a clause, *king* shall have forfeiture of lands during felon's life, and his goods, for there is no eschete to the lord, where inheritance is saved to the heir ib
- By special clause forfeiture of goods, as well as lands, may be provided against ib
- Saving corruption of blood virtually makes heir inheritable, and saves dower 704
- Clergy not ousted without special words ib
- In all *act*s making treason, felony or misprison of treason, peers to be tried by peers ib
- An *act* makes offense felony in offenders, their counsellors, procurers and abettors, and is silent as to accessaries *after*, whether these implied ib
- An *act* making an offense by name, as rape, &c. felony makes all present aiders and abettors principals, tho only one commits it; but as to clergy in some cases it differs ib
- If it makes the offender, his counsellors and abettors felons, yet it makes not the counsellors and abettors principals, unless present; if absent, they are accessaries *before*, unless expressly made all principals, whereof only one, and what instance ib
- Act* making a felony, and limiting it to be tried in a county, where party taken without negative words, but cumulative, and party may be indicted, where offense committed 694, 695, 705
- A second *act* enacting offense felony, that was so enacted before, with some alterations is but cumulative 705
- If one *act* be grafted on another relative to it for the better execution of the former, if former be repealed, latter thereby virtually repealed ib
- Act* making a new felony of an offense that consists of a fact partly in the realm, and partly out, and limiting it to be tried where [offense committed, shall be construed to be where that part of the offense is committed that is within the realm 706
- Act* making a new felony binds not infant under fourteen ib
- How *act*s enacting capital offenses are limited to continue 708
- Act* making offense felony includes misprison, and party may be indicted of the latter only 652, 708
- Where a *puisne* affirmative *act* repeals not a former *act* 705
- B. R. comprised within *act*s, that give power to justices of *oyer* and *terminer* ii. 22
- But justices of peace are not 44
- If a penalty be made recoverable in any of the *king's* courts of record, to what courts it extends ii. 29
- Where the words *no wager of law*, *essoyn*, *protection*, &c. shall be allowed tie up the jurisdiction to courts that can allow a protection, &c. ii. 30
- Where the penalty is recoverable by *original writ*, &c. it is restrained to the superior courts ib
- Whether justices of *gaol-delivery* or *oyer* and *terminer* have a jurisdiction, where *act* limits offense

CONTAINED IN THE TWO PARTS.

fense to be heard before justices
 of peace ii. Page 36
 Where *act* speaks of justices in the
 county, justices of *gaol-delivery*,
 or *oyer* and *terminer* may hear and
 determine it ib
Acts making new treasons to be
 taken strictly 218
 Where an *act* for trial of treason
 is to be taken strictly 157
 Of offenses by statutes, whereof
 justices of peace have not conu-
 sance ii. 44
 Where by a provision *per dominum*
regem & ejus concilium is meant
 an antient statute ii. 99
 Where *mandatum domini regis* sig-
 nifies process ii. 131
 If *act* be prohibitory, and by a
 substantive clause gives a reco-
 very by action of debt, &c. but
 is silent as to indictment, party
 may be indicted on the prohi-
 bitory clause, and thereon fined,
 penalty not recoverable, but
 fine not to exceed it. ii. 173
 If *act* be not prohibitory, but only
if any shall do such a thing, he
shall forfeit 5l. recoverable as
aforsaid, offender not indict-
able ib
 All penal *acts* inducing a forfeiture
 to the king, or making a felony
 or treason are general *acts* ii.
 172
 Where fatal to recite and misre-
 cite them or not ii. 172, 173
Acts ousting clergy construed strict-
 ly ii. 335, 371
 Whether the word *murder* includes
petit treason ii. 340, 342
 Where an *act* ousts accessaries *be-*
fore of clergy, whether it neces-
 sarily ousts principals not men-
 tioned ii. 346, 347
 Whether *outlawry* is included in
 word *attainder* 521. ii. 350,
 352
 All felonies include not *piracy* ii.
 370
 One of the reasons for making 27
H. 8. for transferring uses into
 possession 247
 In most of the particular *acts* of
 Vol. II.

attainder there is a special pro-
 vision that parties attain should
 forfeit all their lands, whereof
 they, or others were seised to
 their use, and also a provision to
 save from forfeiture such lands,
 whereof parties were seised, to
 the use of any other Page 247,
 248

Acts may diversify the offenses of
 accessory or principal according
 to the various penning 615
 Vide Felony by Statutes, In-
 dictment, Treason.

Stray.

The lord may seize it, owner may
 retake it within year and day
 541

Suits.

Difference betwixt civil suits in
compensationem damni illati, and
 criminal prosecutions in *vin-*
dictam criminis commissi 38

Steward.

For the court of lord high steward
 for trial of peers. Vide Court,
 Peer.
 For court before steward of house-
 hold. Vide Court.

Subpœna. Vide Witness.

Superseas. Vide Certiorari,
 Commission, Error, Habeas
 Corpus.

Supremacy. Vide King, Re-
 ligion.

Surdus & Mutus. Vide Deot.

Surety. Vide Bail.

Suspicion.

No man bound to suspect another;
 it is the act of his own judgment
 490

TABLE OF THE PRINCIPAL MATTERS

<i>Where suspicion will justify the imprisonment of the party, or justify or excuse homicide, or not, Vide Arrest, Homicide, Murder, and Manslaughter.</i>	What the great brand of treason Page 75
Swans. Vide Larciny.	Of treasons at common law; great latitude in their construction 79, 80, 81, 82
Tail. Vide Forfeiture.	<i>Accroaching royal power</i> an antient and usual charge of treason 80
Tales. Vide Trial.	Various arbitrary constructions of treasons in the reign of R. 2. 83
Tenure. Vide Forfeiture.	The ill effect of an extrajudicial declaration of treason by the judges of that time 84
Theft-bote.	21 R. 2. & 25 E. 3. compared and the differences remarked 85
OWNER taking his goods again not to prosecute theft-bote Page 619	Just and expedient to lay an overt-act in indictments of treason ib
But taking them again no offence, unless to favour the thief 619	The unhappy consequences of breaking the great boundary, the 25 E. 3. 85, 86
Judgment in theft-bote ii. 400	21 R. 2 repealed by 1 H. 4. 86
Theft. Vide Larciny.	Objections against <i>constructive treasons</i> 86, 87, 293
Token. Vide Cheat.	The petition of the commons, whereon 25 E. 3 was made, and the king's answer thereto; the act is made conformable to the latter 87
Torn. Vide Sheriff.	The several high treasons declared by 25 E. 3. 91
Town and Township. Vide Amercement.	Where a merchant stranger may be dealt with as an alien enemy, and where either as an alien enemy, or as a traitor 94
Traverse.	With what allay these general words of Lord Coke, <i>an alien enemy cannot be guilty of treason</i>, are to be taken ib
All inquisitions taken by sheriff by writ of <i>melius inquirendum</i>, traversable 416	Spies sent over by a foreign prince in hostility, within that rule ib
If dozers in Eyre, or in B. R. present escape of a felon, whereby vill is to be amerced, because this but an amercement, presentment not traversable 603	For other matters touching aliens. Vide Alien.
Vide Coroner, Felo de se, Inquest of Office, Presentment.	Treason in compassing death of king, queen, or prince, &c.
Treason.	Consort of king or queen regent, may be guilty of compassing the death of the king within this act 100
Where king's life is concerned, not safe easily to admit an excuse by misfortune, tho a fact purely casual cannot be treason 41	Who shall be said a king, queen, or their eldest son, or not, within this act 100, 101, 123, 124
Why the offense and punishment so great 59	Wherein compassing death of queen or prince differs from compassing <i>mort de roy</i> 127
Treason may be committed against person of an usurper 61	What

CONTAINED IN THE TWO PARTS.

- What shall be said a compassing
king's death Page 107, 108
- Calculating his nativity, not a
compassing, tho a great offense
108, 334, 335
- Compassing *king's* death, tho not
effected treason 108
- What overt-act necessary to make
such compassing treason 108,
109
- Conspiring *mort de roy*, and there-
upon providing weapons, or
sending letters for the execution
thereof is an overt-act of com-
passing *king's* death 109
- If men conspire to imprison the
king by force till he hath yield-
ed to certain demands, and for
that purpose gather men, or
write letters, it is compassing
king's death ib
- A conspiring to depose the *king* is
an overt-act of compassing his
death 110
- A foreign ambassador for com-
passing *king's* death shall be exe-
cuted here for treason, but for
other treasons shall be remitted
to his own country to be tried
117
- Where an ambassador may be guilty
of treason, vide Ambassador.
- Compassing by words not an overt-
act, as appears by many tem-
porary acts against it; but words
reduced to writing, &c. are an
overt-act 111 to 120, 310, 312,
322, 323
- Words may expound an overt-act
indifferent in itself 115, 116
- Whether words menacing *king's*
death be an overt-act of com-
passing his death 115, 116, 117
- Assembling together to consult
how to kill the *king* is an overt-
act of compassing his death
119, 120, 121, 122
- Whether conspiracy to levy war be
an overt-act, unless levied
119, 133, 145, 148, 322
- Writing letters to a foreign prince
inciting an invasion is an overt-
act 120, 122
- As an overt act must be laid, so it
must be proved 121, 149
- If an overt act sufficiently laid in
the indictment be proved, any
other may be given in evidence
in aggravation Page 122
- Buying a dagger for the purpose is
an overt-act of compassing *king's*
death ib
- Assembling together to levy war
against the *king*, either to de-
pose or restrain, or enforce him
to any act, or to come to his
presence to remove his counsel-
lors or ministers, or to fight a-
gainst his lieutenant or military
commissionate officers, &c. is an
overt-act of same kind 122,
123, 138, 148, 151
- A levying war by construction, as
to pull down all inclosures, or
all bawdy-houses, not evidence
of an overt-act of compassing
king's death, when it is disclosed
upon proof, or so laid in indict-
ment, but it is an evidence
thereof till disclosed 123
- Fighting *king's* forces sent to sup-
press a riotous assembly is an
overt-act of same nature ib
- Treason in violating *king's* wife,
&c.
- Who shall be said *king's* wife, his
eldest son's wife, or his eldest
daughter, to make the violation
of any of them treason 128,
229
- Treason in levying war against the
king.
- Levying war only treason within
this act 111, 322
- What must concur to make levy-
ing war treason within this act
130
- What shall be said a levying war,
or not 130, 131, 149, 150, 152
- A bare conspiracy to levy war and
provide weapons for that pur-
pose, though in some cases it may
amount to an overt-act of com-
passing the *king's* death, yet it
is not a levying war within this
act 131

A TABLE OF THE PRINCIPAL MATTERS

- Assembling many rioters to do unlawful *acts*, if they be not in *specie belli*, nor have any arms, &c. may make a riot, but it is not a levying war Page 131, 149, 150, 152
- War must be levied against the king; *contra*, tho it be *more guerrino*, it is not treason 131, 149, 152
- If on a private design, or private quarrel, it is no levying war against the king 131, 133 to 138, 140, 141, 149, 152, 260
- Difference between *bellum levatum* & *bellum percussum* 152
- A war levied against the king is of two sorts, expressly and constructively. First, Against his forces, &c. Secondly, to throw down inclosures generally, to increase servants wages, alter religion, expulse strangers, or remove counsellors, or against any statute, &c. this is a levying war, because end public 131, 132, 133, 134, 152, 153
- Conspiring to levy such a war treason by several temporary *acts* 132
- Clause in 25 E. 3. of consulting the parliament in new cases leaves no latitude to multiply constructive treasons, very dangerous so to do ib
- If a war levied, conspirators are traitors, as well as actors 133
- War levied to break prisons to deliver one, or some particular persons out of lawful prison, unless imprisoned for treason, only a great riot; but if to break prisons generally, it is treason 134
- 100 persons *modo guerrino* assembled to pull down bawdy-houses, and marched with a flag on a staff and weapons, and pulled down certain houses, held to be a levying war within this *act* by all the judges but one; objections to that judgment 134, 135
- In earl of Essex's case resolved, that when queen sent lord keeper to him commanding him to dismiss the armed people in his house and come to her, and he refused to come, and continued the arms and armed persons in his house, it was treason Page 138
- That when he went with a troop of captains and others from his house into the city, and there prayed aid of the citizens in defence of his life, and to go with him to the court to bring him into the queen's presence with a strong hand, so that he might be powerful enough to remove certain of his enemies attendant on the queen, it was treason, the fact in London rebellion ib
- That the adherence of earl of Southampton to earl of Essex in London, tho he knew not of any other purpose than of a private quarrel, which Essex had against certain servants of the queen, was treason in him, because a rebellion in the earl of Essex ib
- That all they, that went with Essex from his house to London, whether they knew of his design, or not, were traitors, whether they departed on the proclamation, or not; but that those, that suddenly adhered to him in London, and departed on proclamation made, ought to be pardoned ib
- A declaration of the king and lords [*sans* the commons] not sufficient within this *act* 140, 260, 263
- Where 300 persons going in a warlike manner with drums and arms to surprise a privy counsellor, held treason 141, 152
- Breaking prison where traitors are and causing them to escape, treason, tho parties knew not that they were there 141
- Marching with a great army *modo guerrino arraiati*, express levying war, tho no blows struck 144, 145, 152
- A rebellion is a levying war within this *act*, and by name of levying

CONTAINED IN THE TWO PARTS.

- levying war it must be exprest in indictment *Page* 144, 145, 152
- Bare detaining *king's* torts or ships, or conspiring to take them not treason; actual taking them, by force, a levying war within 25 *E. 3.* 146, 296, 325
- Detaining *king's* towns, &c. after demanded by *king's* commissioner, and repelling an assault made by him, is a levying war within this *act* 146, 325, 326
- Difference between an insurrection on account of civil interest, and levying war 146
- Holding one's house against the sheriff and *posse comitatús* with force, and assembling persons to oppose the execution of a writ of possession, no treason, but a great riot; the like of keeping possession against a restitution on indictment of forcible entry *ib*
- Assaulting *king's* lieutenant in time of hostility or rebellion within the realm, in their march or quarters, as enemies, levying war *ib*
- If on sudden falling out, or injury done by the soldiers, the countrymen rise and drive them out, it may be a great riot, but not levying war, except some traitorous design under cover of it *ib*
- Open resistance of justices of *oyer* and *terminer*, only felony *ib*
- Touching laws of treason in *Ireland* by 18 *H. 6.* and *cessing* soldiers. *Vide Ireland.*
- What usually is the overt-act of levying war 150
- Whether the bare assembling an enormous multitude for doing unlawful acts without any weapons, &c. be a sufficient overt-act of levying war within this *act*, especially if they commit some of these acts 151
- Realm of *England* comprehends the narrow seas, invading *king's* ships in the narrow seas, levying war *en son realm*; where trial to be 154
- For trial of treasons in *Scotland*, provision made by what statutes *Page* 155
- What is said of *Ireland* in all particulars applicable to the *Isles of Man, Jersey, &c.* 155, 156, 157
- Vide Ireland.*
- Treason committed in *Wales* before 26 *H. 8.* was not inquirable, or triable before justices of *oyer* and *terminer*, or in *B. R.* but before justices assigned by the *king* in those counties of *Wales*, where fact committed 156
- By 26 *H. 8.* counterfeiting, washing, clipping, or minishing coin, felonies, murders, &c. and accessaries of same and other offenses feloniously done in *Wales*, or any lordship marcher may be inquired of and tried before the justices of gaol-delivery, &c. in next adjacent county 156, 157
- 26 *H. 8.* confirmed by 34 & 35 *H. 8.* which settles the grand sessions, so that as to those offenses enumerated in 26 *H. 8.* justices of *gaol-delivery* in the adjacent counties, *viz. Gloucester, &c.* had thereby a concurrent jurisdiction with justices of grand sessions 157
- Whether 26 *H. 8.* extended to treason for compassing *king's* death, or levying war, or whether same remained triable by justices of grand sessions, but now 26 *H. 8.* stands repealed by 1 & 2 *P. & M.* as to trials of treason *ib*
- For what special purposes *certiorari* lies into *Wales*, but not as to trial of fact, but it shall be sent down by *mittimus* by 7 [27] *H. 8.* 158
- Wales* within *England*, and therefore not within 35 *H. 8.* for trial of foreign treasons *ib*
- If treason, &c. be done in *Durham*, a *certiorari* lies to remove it into *B. R.* out of *Durham*, L 13 and

A TABLE OF THE PRINCIPAL MATTERS

- and to whom directed; but if party plead *not guilty*, it shall be sent down thither to be tried
Page 158
- Of *treasons*, &c. in *Tindal* and *Hexamshire* *ib*
- Adhering to the king's enemies.*
- Who shall be said an enemy; jury on trial shall inquire, whether the person to whom the party indicted adhered was an enemy, or not, and whether there was a war between *king of England* and that other prince, whereunto party adheres *164*
- Enemy* extended farther than *king* or state at enmity, even to an *alien* coming into *England* in hostility *ib*
- Duke of *Norfolk* adhering to lord *Herise*, a subject of *king of Scots* in amity with queen *Eliz.* that made an actual invasion upon *England* without the *king's* commission, adjudged a traitor *164*
- Who shall be said to be a person adhering, and what an adhering *165, 166, 263*
- If there be war between *England* and *France*, those *English* that live in *France* before the war, and continue after, they are not adherents, unless they assist the *French king* in his wars, or refuse to return on privy seal or proclamation, and this refusal, tho evidence of an adherence, not simply so in itself *165*
- Whether subjects of foreign prince continuing under *king's* protection after war proclaimed, and assisting the foreign prince before renouncing his subjection to the *king*, or an enemy staying here under *king's* safe conduct, be an adherent; in time of truce an *Englishman* goes into *France*, and stays there, and returns before truce expired, no adherence; but *contra*, if he confederate with the enemy *165, 166*
- Kings of England and France* in amity, the *king's* subjects solicit *king of France* to an invasion, it is treason and an overt-act of compassing *king's* death, but not of adherence *Page 167*
- An *Englishman* during the war is taken by the *French*, and swears fealty to the *king of France*, if voluntary, it is an adherence, but if for fear of life, and he return as soon as he can to his allegiance, this not an adherence *167, 168*
- Delivering up the *king's* castles or garrisons treacherously, or by bribery, an adherence *168, 169*
- If delivered on cowardice or imprudence, and not treacherously, tho party subject to death by martial law, not treason by common law *169*
- If detaining *king's* castles or forts, or the castles of any other be barely such, and without assault, yet if in compliance or confederacy with a foreign enemy, it is an overt-act of *adhering to king's enemies*, and treason within this act *326*
- By 35 *H. 8.* foreign treasons how tried; by the common law triable in any county, especially where offenders lands lie *169, 170*
- Treasons on the sea triable by special commission grounded on 28 *H. 8.* at common law it might be tried in any adjacent county *ib*
- 1 *Mar.* reducing all treasons to the standard of 25 *E. 3.* not only repeals treasons newly enacted, but acts declarative, and all treasons farther than the very declaration of 25 *E. 3.* extends *222, 260, 263, 265, 269, 308*
- Killing chancellor, treasurer, &c. in their place doing their office.*
- This extends only to killing, not to conspiring; but if many conspire,

CONTAINED IN THE TWO PARTS.

- spire, and only one do the act, they are all traitors; 3 H. 7. makes the conspiring felony *Page 230*
- Exposition on this branch of the act 231, 232
- Justice of peace, as such, not within it, except he be likewise justice of oyer and terminer 231
- What shall be said *seant en son place, fesant son office* 232
- Touching principals in treason, *vide Principal and Accessary.*
- In treason no accessaries, all principals; but *quare*, whether receiver of a counterfeiter of the seal or money be a traitor 233, 234, 237
- Gaoler voluntarily permitting traitor imprisoned to escape, treason 234
- Rescue of a person arrested for treason same offense 234, 269
- Breaking prison to enlarge a traitor, treason; but he must really be a traitor 234, 235, 326
- Conspiracy to enlarge a traitor, neither treason, misprision, nor felony, but a misdemeanor 326
- Offenses incident to the treasons declared by 25 E. 3. are virtually included within the same, as receiving, &c. 235, 237, 238, 269
- If an act make a new treason, and enact that the offender, his counsellors, abettors and aiders thereunto shall suffer as traitors, this makes not receivers or comforters after the fact traitors 235, 236, 328, 376
- But whether receiving a counterfeiter of coin within 25 E. 3. where no such restriction, be treason 328
- If offense be made treason in offender, his procurers, counsellors, abettors, consenters (without the word *thereunto*) knowing receivers not traitors, unless the words *receivers* or *comforters* be exprest 236
- The import of the words *procurers, counsellors, abettors, consenters, aiders, receivers* and *comforters* *Page 236*
- Receivers, traitors by necessary construction of a new act of treason ib
- Where an act general, probably receiver knowing it virtually a traitor 237
- Certainly aiders, &c. are traitors ib
- He who rescueth one imprisoned for treason, or suffers him voluntarily to escape, or receiver of a traitor, shall not be arraigned till principal offender be convicted, and why 237, 238
- Receiver of a traitor how to be indicted 238
- If indicted of the receipt in the same indictment with the principal, principal to be tried first; and if found guilty, then jury to inquire of the receipt; and if principal *not guilty*, then to acquit both ib
- Whether process of outlawry may go against receiver of a traitor at same time as against principal ib
- What will make a man accessory after to felony will not make a man principal in treason 239
- How far charitable relief will do it 239, 324, 325
- The words in 1 Mar. refer to treasons, not forfeitures; the forfeiture of traitors, as to old treasons, stands in force 241, 257, 275, 283, 309
- Of declaring treasons by parliament, and those that were enacted or declared between 25 E. 3. & 1 M. 258, 259, 260
- Some things enacted to be treason by new and temporary laws, which were treason by 25 E. 3. 261, 262, 322
- An act for safety of king's person enacts an offense to be felony only, or a misdemeanor, (without the clause, *the same not being treason within 25 E. 3.*) carries a presumption with it, that same was not treason before,

A TABLE OF THE PRINCIPAL MATTERS

- fore, and is a judgment of parliament in point *Page* 261, 262
- Commons impeach several of treason, lords only give judgment, this not *per modum legis declarative* 264
- In the *act* of attainder against the earl of *Strafford*, proviso, that it should not be a precedent, needless; it did not *egredi personam*, and was no general declarative law to serve 25 *E.* 3. 269, 270
- Proper proviso in enacting new treasons to save to the lords their liberties, as in case of felony 270
- 11 *H.* 7. for securing the attendants on the king in his wars, is perpetual 272, 273
- What *acts* for trial of treason are in force, or repealed or derogated from by any, and what other statutes 282, 283, 284, 316
- Trial of treasons committed in rivers, or ports within counties, restored to the common law 282, 316
- Exposition of 1 *E.* 6. 3 & 4 *E.* 6. 5 & 6 *E.* 6. 287, 288
- Writing of scandalous words (mentioned in 5 & 6 *E.* 6. and thereby made treason) not treason within 25 *E.* 3. 296
- So much of 5 & 6 *E.* 6. as enacts new treason, repealed by 1 *Mar.*, but the clauses in that *act* touching trial of foreign treasons, outlawry of persons beyond the seas, forfeiture of lands, loss of dower stand unrepealed, and so, according to many, doth the clause concerning two accusers *ib*
- In what cases of treason two accusers are required by 5 & 6 *E.* 6. whether it extends to new treason 297, 324
- Whether 1 & 2 *P.* & *M.* took away the necessity of two witnesses on the indictment 298, 299, 300
- Touching the competency of such witnesses, *vide* *Quintus* 301
- Of treasons declared and enacted from 1 *Mar.* till 13 *Car.* 2. *Page* 307, 308
- 1 *Mar.* repealed all treasons and misprisions of treasons enacted since 25 *E.* 3. 308, 310
- 1 *Mar.* meddles not with those new laws regulating proceedings and trials, but that done after by 1 & 2 *P.* & *M.* 309
- Treason generally spoken intended of high treason 316
- Peremptory challenge in case of high treason, restored; prisoner may challenge thirty-five peremptorily 317
- To make a man principal in treason by *comfort* or *aid* after offense committed, it must be knowingly 323
- In new treason *aiding and comforting* thereof, treason *ib*
- If a physician relieve a sick offender, tho knowing him to be a traitor, no treason 332
- Some words or writings may be construed to stir up insurrection, and yet be not within 25 *E.* 3. 334
- What courts have jurisdiction in treason 350
- What the consequents of a judgment in treason 354
- All treasons are misprision of treason, and more, and he who is assenting to a treason may be indicted of misprision of treason, if *king* pleases 374
- Misprision of treason may yet be tried according to 33 *H.* 8. for trials of treason in foreign countries *ib*
- In misprision of treason or felony, or accessory thereto, a peer tried by peers, tho indictment by common grand inquest *ib*
- If a person arraigned of high treason stand mute, he shall be convicted 223, 382
- Treason is felony, tho more, and the *king* may proceed against a traitor for felony only 497

CONTAINED IN THE TWO PARTS.

25 E. 3. of treasons called the statute of purveyance ii. Page 330
Before 25 E. 3. what treasons of greater note, what of less note ii. 331

[Statutes relating to treason enacted since the author wrote; in notis] 339 to 342

Whether in any case a non compos mentis can commit treason. Vide *Idiot*.

For treasons in maintaining pope's supremacy, in reconciling and being reconciled to the popish religion, and in bringing in pope's bulls, and for treasons committed by jesuits, &c. Vide *Religion*.

For treason in counterfeiting the coin. Vide *Coin*.

In counterfeiting the great and privy seals, privy signet and sign manual. Vide *Seal* and *Sign manual*.

For petit treason. Vide *Petit Treason*.

Where alien may be guilty of treason, or not. Vide *Alien*.

Vide *Alligance*, *Corruption* and *Restitution of Blood*, *Forfeiture*, *Indictment*, *Judgment*, *Misprision*, *Necessity*, *War*.

Treasure-trove. Vide *Franchise*, *Larciny*.

TRESPASS.

Chance excuseth from felony, but not trespass 472

Trespass lies for taking away dogs, bears, &c. or their whelps 512

It lies for church-wardens for taking *bona & catalla parochianorum*; substance of declaration ib

If A. take away the hay or corn of B. and mingle it with his own heap or stock, or take the cloth of B. and embroider it, B. may retake the whole heap or stock, or garment and embroidery, and be not guilty even of trespass 513

Feme takes *Baron's* goods, and delivers them to B. who knowingly carries them away, trespass Page 514

In trespass, where it is of their own possession, the executor, ordinary, &c. need not shew their title 514, 515

Vide *Justification*.

TRIAL.

By jury the best method of trial 33

Where a non compos mentis shall be tried, or not, and where court in discretion may discharge the jury of him, vide *Idiot*.

Where felony by statute limited to a special jurisdiction, and manner of trial, misprision of it triable by a common jury and general commissioners of oyer and terminer 653

On 8 H. 6. against avoiding records trial to be one half by the clerks of the court, and the other half by others 651

Trial of *aliens* for felony to be *per medietatem linguæ* ii. 271

Whether indictment be a distinct thing from the trial 221, 298 to 301

Irish peer tried here by a common jury 155, 317, 693

Touching Jury process.

If *venire fac.* or *distringas* be erroneous, and would make judgment so, if filed, but being not filed is aided by 18 Eliz. court never compels clerk to file such writs after verdict, much less punishes them for not doing it 651

If offense committed in county, where B. R. sits, and indictment be taken there, B. R. may proceed *de die in diem*, and there need not fifteen days between *teste* and return of *venire* ii. 3, 360

And

A TABLE OF THE PRINCIPAL MATTERS

- And so if indictment was taken before justices of peace of same, and removed into *B. R.* by *certiorari*; but *contra*, if taken in another county than where *B. R.* sits ii. Page 3, 360
- Of *venire fac.* issuing out of *B. R.* how to bear *teste*, &c. ii. 260
- Justices of *oyer* and *terminer* issue a general precept for the return of twenty-four jurors to try the issue between *king* and prisoners to be arraigned ii. 26, 27, 260, 261
- After the prisoners are arraigned, and have pleaded to the country, a precept issues in nature of a *venire fac.* when such precept bears *teste*, and when returnable in whose name, and under whose seals, it must be ii. 261
- If they make it returnable any day after the first day of sessions, they must make an adjournment, and record it ib
- Justices of gaol-delivery after prisoner hath pleaded may take pannel from sheriff without making any precept to him ib
- Whether process be by writ or precept, as well the award, as writ or precept must mention truly the *visne*, and where it is only by award without writ or precept, as in case of justices of gaol-delivery, the award ought to mention the *visne* ii. 262
- If murder be supposed at *D. venire fac.* must be *de vicineto D.* if at *Bristol de vicineto Bristol*, because a city; yet *de vicineto civitatis Bristol*, tho also a county, good ib
- If stroke be laid at *B.* and death at *C.* how *visne* must be ib
- Where stroke in one county, and death in another, *visne* shall be from place, where party alleged to die ib
- If murder be laid in *quâdam placetâ vocat. King-street in paroch. Sanctæ Margaritæ apud Westm.* whence *visne* to arise ib
- If murder be laid *apud B. in paroch. de C.* whence *visne* shall be ii. Page 262
- Vill or hamlet may be within a parish, and a parish may contain many vills ii. 262, 263.
- Foreign pleas triable by a jury of same county, where party indicted, except in treason ii. 239 263
- Tho *venire fac.* is only to return twelve, yet sheriff ought to return twenty-four, the general precept that issues before a sessions of gaol-delivery, *oyer* and *terminer*; and *peace* is to return twenty-four, but commonly forty-eight are returned ii. 263
- Several indicted for one felony, justices may issue one or several *venire fac.* or awards of that kind ii. 263, 268
- If it be joint, and one challenge twenty peremptorily, or for cause, jurors challenged shall be drawn against all, and so in appeal ii. 263
- Expedient to make out several *venire fac.* and if pannel be challenged off, yet forty *tales* may be granted on each *venire fac.* ib
- If *venire fac.* in appeal be once granted jointly, it cannot be severed, neither can there be several *tales*, for if *venire fac.* be joint, *tales* must be joint, and so in case of indictment ii. 263, 264
- Before justices of gaol-delivery, where only one award, tho at first it be joint, and pannel accordingly returned, and the prisoners challenge peremptorily severally, whereby there are not enough left on the pannel to try them, and a *tales* is awarded returnable the next day, yet court may sever first award, and also the *tales* ii. 264
- Record being made up, the award is made on the roll, which the justices of gaol-delivery may model.

CONTAINED IN THE TWO PARTS.

del, as they please, at any time before trial ii. Page 264

On the writ or precept, or command to the sheriff he cannot return a *mandavi ballivo*, as in some cases of appeal, writ, &c. being for the king ib

The *analysis* of the writ of *venire fac.* ib

They of one side of the county are by law *de vicineto* to try an offense of the other side of the county ib

Justices of *gaol-delivery* and peace have power to reform the pannel ii. 36, 156*, 265

Usual for the judge on crown-side to send for a jury to judge at *nisi prius* ii. 265

If process be in *B. R.* and jury fill not, or be challenged off, so that there is not a full jury, there ought to issue a *distringas juratores*, and a command to return a *tales* ii. 265, 266

But if whole jury be challenged off, then there shall be a new *venire fac.* and if none appear, then a *distringas juratores* shall issue, and no *tales* ii. 265

If a full jury appear, and before they are sworn, one of them dies, so that there remains not a full jury, a *tales* shall be granted; and so if a jurymen dies after returned and sworn ii. 266

If a *tales* issue, and they do not appear full, or be challenged off, so that those, that appear on principal pannel and *tales* make not up a full jury, another *tales* may be granted ib

In felony a *tales* may be granted of a greater number than the principal pannel in respect of the challenges, so that there may be forty *tales*, or more; but if several succeeding *tales* be granted, the latter must be less in number than that which was next before, unless the array of the preceding *tales* be quashed, and then the number

of the next may equal it ii. Page 266

The times between *teste* and return of *tales* must be as in principal *venire fac.* ib

If indictment be before justices of oyer and terminer, the *tales* as well as principal pannel ought to be in the name of three justices, and may be returnable *de die in diem*, or *de hora in horam* of same day ib

As to all other matters, they agree with proceedings in *B. R.* above-mentioned ib

Before justices of *gaol-delivery* no particular precept to return either jury or *tales*, but the general precept before the sessions and the award ib

And yet there is an instance before justices of peace and *gaol-delivery* of a *tales* granted returnable the next day ii. 267

After *not guilty* received and recorded sheriff returns pannel of jury ii. 293

Where trial of treason or felony shall be, *vide County, County Palatine.*

Where new trial shall be granted, *vide petit jury in titulo Jury.*

Vide Arraignment, Certiorari, Challenge, Court, Evidence, Gaol-delivery, Indictment, Jurisdiction, Justices of Assize and Nisi prius, Justice of Peace, King's Bench, Oyer and Terminer.

Trust. *Vide Forfeiture.*

Turn. *Vide Sheriff.*

Venire facias. *Vide Trial.*

Venue. *Vide Trial.*

Verdict.

ON indictment of treason in adhering to king's enemies, what jury shall inquire of 164

In

A TABLE OF THE PRINCIPAL MATTERS

In all cases of infancy, insanity, &c. if one incapable to commit a felony be indicted by the grand inquest, and thereon arraigned, petit jury may either find him *not guilty*, or find the matter specially, and how, and thereon court gives judgment of acquittal Page 28 ii. 303

But if one in such case be arraigned on indictment of murder or manslaughter by coroner's inquest, there if party committed the fact, regularly the matter ought to be specially found, because if the jury find him *not guilty*, they must inquire how party came by his death, and how in that case they must find

ib

But if he be first arraigned, and acquitted on the indictment by the grand inquest, and found *not guilty*, he may plead that acquittal on his arraignment on the coroner's inquest, and that will discharge him, and petit jury shall inquire farther how he came by his death 39

If prisoner indicted of murder or manslaughter by grand inquest be acquitted by petit jury, they say so and no more, and only inquire of the flight; but if acquitted on pleading to coroner's inquest, petit jury also find, who killed the party, if they do not know, how in that case they find ii. 64, 65, 300, 301, 304, 305

If indictment be of murder or manslaughter, and on trial it appear to jury to be involuntary, (as *per infortunium*, or *se defendendo*) jury ought to find the special matter, and conclude, *Et sic per infortunium*, &c. and not generally, that it was *per infortunium*, &c. for on the special matter found court may give judgment against conclusion of verdict 471, 476, 477. ii. 302

If jury find him *not guilty*, they must inquire, whether he fled;

and if they found he did fly, they must inquire of his goods and chattels, which is an inquest of office and traversable

Page 362, 493. ii. 301

Where one of full age shall be found guilty of burglary, and an infant, who was principally concerned in it, *not guilty* 556
Baron shall be found guilty, where *feme* in his presence, and by his coercion commits burglary, or larciny, but she shall be acquitted 45, 516, 556

If indictment comprises burglary and felony, prisoner may be acquitted of burglary, and convicted of felony within clergy, or he may be acquitted of the felony; but *quære*, whether he can in that case be convicted of burglary 559, 560. ii. 302

Where burglary felony, and felony on 5 & 6 E. 6. are joined in one indictment, prisoner may be acquitted of one, and convicted of the other two 560

If he be found guilty of burglary, and not of stealing, he may be convicted of burglary; and if acquitted of burglary, he may be convicted of felony within 5 & 6 E. 6. and if acquitted thereof, he may be convicted of larciny 561

If *A.* kills *B.* upon assault made on him in executing process, or in his own defense, in the highway, or in defense of his house against persons come to rob him, on *not guilty* pleaded, he ought to be acquitted ii. 158, 303

In treason or felony, if any *eschete* or forfeiture of land be conceived in the case, petit jury ought to find true time of offense committed 361. ii. 179, 291

In petit treason prisoner may be acquitted thereof, and be convicted of murder or manslaughter ii. 184

Where there was once a writ [of exigent], and record since lost, on circumstances the jury may find

CONTAINED IN THE TWO PARTS.

- find the record, tho not shewn in evidence ii. Page 207
- Where two indictments for same fact; one of murder, the other on 1 *Jac. of stabbing*; how jury to find 468. ii. 239, 240
- If duress and compulsion will excuse the prisoner, jury on general issue ought to find accordingly ii. 258, 259
- If *A.* be indicted for a robbery or murder in wrong county, he ought to be acquitted, but variance between indictment and evidence in the vill immaterial ii. 291
- If verdict be given by mistake or partiality, jury may rectify it before recorded, or by advice of court go together again, and reconsider it ii. 299, 300
- If recorded, they cannot retract or alter it ii. 300
- In felony or treason no privy verdict can be given ib
- If one be indicted *de morte cujusdam ignoti*, jury shall be charged to tell his name, if they can ib
- Where prisoner was acquitted of robbery, court antiently compelled jury to present who did it, but now *contra* ii. 300, 301
- If coroner's inquest *super visum corporis* present a *fugam fecit*, and party be arraigned, and plead to that indictment, jury not charged to inquire of the flight, and why ii. 301
- Jury may find a special verdict, or may find prisoner guilty of part, and not guilty of the rest, or find him guilty of the fact, but vary in the manner ii. 301, 302
- One indicted of robbery may be found guilty of felony, and not robbery ii. 302
- So where indictment charges the larciny to be *clam & secretè a personâ* ib
- One indicted on 1 *Jac. of stabbing contra formam stat.* may be acquitted on the *act*, and convicted of manslaughter ib
- One indicted of grand larciny may be convicted of petit larciny ii. Page 302
- One indicted of murder may be convicted of manslaughter ib
- Where coroner's inquest found that it was *per infortunium*, and jury found him generally *not guilty*, tho fact appeared to be *infortunium*, verdict of *not guilty* recorded ii. 303
- If coroner's inquest find not the special matter, but murder or manslaughter, and prisoner is arraigned on it, and pleads *not guilty*, and on evidence it appears that the prisoner killed the man, but not feloniously, in this case jury cannot find a general *not guilty*, but must find that the prisoner did it, and the manner how, and this to be entered of record, as in case of a verdict *se defendendo* ii. 304, 305
- Many special verdicts have been found, as on 1 *Jac. of stabbing* so on the point, *whether murder or not*; but it is difficult to find them so that judgment be given for murder, and why ii. 305
- Rarely on any special verdict, where question *murder or manslaughter*, judgment given for murder, but commonly manslaughter ib
- Felony laid as required by *act* ousting clergy, but evidence comes not up to it, where prisoner shall be convicted of simple felony ii. 336
- Where verdict avoided for *misdemeanors of jury*, &c. the special matter being indorsed on the *postea*, vide *petit jury sub titulo Jurp.*

Vide Evidence.

Verge.

For commissions of oyer and terminer for the verge, the extent thereof, and manner of trials within the same, vide Court.

Vine.

A TABLE OF THE PRINCIPAL MATTERS

Uisne. Vide **Trial.**

Use. Vide **Forfeiture, Statutes**
in general.

Waifs.

IF a felon waive the goods stolen without any pursuit after him, those goods are not in law *bona waviata*, nor forfeit to the king or lord; but if he waive them on pursuit, then they are *bona waviata*, and forfeit to the king or lord Page 541

This forfeiture is not like a stray, where, tho the lord may seize, yet owner may retake them, within year and day; but here true owner cannot seize his own goods, tho on fresh suit within year and day ib

How a man shall obtain restitution of goods waived ib

Wales.

Before 26 *H. 8.* no treason or felony committed in *Wales* was inquirable or triable before justices of *oyer or terminer*, or in *B. R.* in *England*, but before justices assigned by the king in those counties of *Wales*, where fact committed 156

But by the same *act*, what offenses and accessaries of the same, feloniously done in *Wales*, or any lordship marcher may be inquired of, and tried before justices of gaol-delivery and the peace, in next adjacent county 156, 157. ii. 38

This *act* confirmed by the great statute of *Wales* 34 & 35 *H. 8.* which settles the grand sessions and justices thereof 157

As to offenses mentioned in 26 *H. 8.* justices of gaol-delivery in the adjacent counties, and what counties these are, had thereby a concurrent jurisdiction with the justices of grand sessions ib

But whether 26 *H. 8.* extended to treason for compassing king's

death, or levying war, or whether same remained only triable by justices of grand sessions, doubtful; but now 26 *H. 8.* stands repealed by 1 & 2 *P. & M.* as to trial of treasons Page 157, 282. ii. 38

In other criminal causes not capital, as in indictments of riots, they may be removed into *B. R.* by *certiorari*; and when issue is joined they may be tried in next *English county* ib

Whether a *certiorari* lies into *Wales* on indictment of treason or felony 158

It seems it may issue for special, and what purposes, but not as a trial of fact, but it shall be sent down by *mittimus* according to 6 *H. 8.* ib

Wales withing realm of *England*, and therefore not within 35 *H. 8.* for trial of foreign treasons ib

War.

Jus gladii, both civil and military, and so is power of making peace, *inter jura summi imperii*; none can levy war here without the king's commission 130, 159

War succeeds best when concerted with the parliament 159

What shall be said enemies of the king, subjects not properly *hostes*, but rebels or traitors ib

The several kinds of peace 159, 160

A truce described 159

A league explained, and distributed into its several kinds 159, 160

Ubi bellum non est, pax est 160

War by the *Spaniards* on the *Indians* under pretence of religion, injurious, tho there intervened no former articles of peace between them ib

War divided into *bellum solemne* & *non solemne* ib

What circumstances a solemn war amongst the *Romans* had attending it 160, 161

These

These solemn denunciations of war had place only in offensive or invasive wars, and even then had many, and what exceptions

Page 161

Many of these antient solemnities antiquated 162

If *de facto* there be a war between princes, they and their subjects are *hostes* to each other ib

Of the modern practice of arms 162, 163, 164

The wars we have had with foreign kings divided into special and general 162

Special usually called *marque* or *reprisal*, subdivided into particular and general *marque* or *reprisal* 162, 163

Vide *Marque* or *Reprisal*.

General *reprisal* may grow into a formed war; an instance thereof between us and the *Dutch* 164

A general war of two kinds; *bellum solemniter denuntiatur*, or *bellum non solemniter denuntiatur*, both illustrated 163, 164

A war may be between two kingdoms without any proclamation or indiction thereof, or other matter of record to prove it 164

When the *king's* courts are open, it is time of peace in judgment of law 347

In time of war, if one enemy plunder or rob the house of another, it is only an act of hostility 565

Offenses of this kind, committed on some of same party, or others who are not in an hostile state, are felonies ib

Vide *Treason*.

Warrant.

For warrants to arrest felons, vide *Arrest, Justice of Peace*.

For warrants to search for stolen goods, vide *Justice of Peace*.

Vide *Commitment*.

Warren. Vide *Dark*.

Wera, or Weregild.

Amongst the *Saxons* a commutation of judgment of death in case of homicide; but if party insolvent, he was to suffer death

Page 7, 8

How long this custom prevailed, and how it came to surcease ib

Witchcraft.

Before 1 *Jac.* it was not felony, because it wanted a trial [how far 1 *Jac.* derogated from by 9 *Geo.* 2. vide *act*]. 429

Vide *Felony* by Statute, *Religion*.

Witness.

Whether 5 & 6 *E.* 6. requiring two witnesses on trial and indictment of treason extends in law to new treasons made after the *act* 297, 324. ii. 287, 288

If a new treason were made by a subsequent *act* without any clause directing indictment or trial in any other manner than is appointed by this *act*, there must be two lawful accusers, both on the indictment and trial ib

If there be by a subsequent *act* any derogatory clause from this *act*, then there need not be two witnesses ib

Whether by any *act* this be repealed or derogated from with respect to indictment or trial

297 to 301

As to counterfeiting coin, or so much as was treason for impairing it, by 1 & 2 *P. & M.* it is expressly provided, that no other evidence shall be requisite, either on indictment, or trial, than was before 1 *E.* 6. 221,

297, 298. ii. 287

As

A TABLE OF THE PRINCIPAL MATTERS

As to clipping and washing, 5 & 18 *Eliz.* in exprefs terms require only a conviction and attainder, *according to the order and course of the law*, and 5 & 6 *E. 6.* is fo far derogated from by these *acts* Page 221, 297, 298, ii. 287

As to all other reasons than counterfeiting, clipping, and washing coin, 1 & 2 *P. & M.* hath taken away necessity of two witnesses on trial, but whether it hath taken away necessity of two witnesses on indictment 297 to 301, 324. ii. 286, 287

In misprision of treason two witnesses necessary, both on indictment and trial 300

What shall be said two lawful witnesses within 5 & 6 *E. 6.* 301, to 307

[By 7 *W. 3.* no person shall be indicted, tried, or attainted of treason, but on the oaths of two lawful witnesses, which two witnesses must be to same treason, tho not necessary that they should both be to same overt-act; in notis] 341

Lawfulness of witnesses respects either the persons or testimony of the witnesses 301

Where *feme* a lawful witness against *baron*, or not 302. ii. 279

She is not bound to swear against another in theft, if her husband was concerned, tho not directly against him 301

A woman taken away and forcibly married, *contra* 3 *H. 7.* may be sworn against her husband; but otherwise, if she assent to the marriage by free cohabitation 301, 302, 660, 661

Infant under fourteen not regularly admissible, but in what cases under that age he may be admitted a witness 278, 279

A party interested not a lawful witness 302, 303. ii. 280, 281, 282

A party to an usurious contract were a lawful witness, or not 302. ii. 280

One having a promise of the goods or lands of a party attainted, no lawful witness to prove the treason Page 303

A person outlawed in trespass a witness, tho no lawful juryman ib

A father or son, or master or servant, a lawful witness for his correlative 303. ii. 276

An adversary in a suit a good witness 303

A *particeps criminis* in some cases a lawful accuser within 5 & 6 *E. 6.* ib

An approver shall be sworn to his appeal, but whether on the trial, if appellee puts himself on his country 303. ii. 234

Two charged with a crime, one shall not be examined against the other, except he confess himself guilty ib

The party that is to be a witness against his accomplices never indicted, because he doth weaken his testimony, tho not take it away 303, 304, 305,

A party to the treason who hath confessed it, may be one of the two accusers in case of treason, and is sufficient to satisfy 5 & 6 *E. 6.* 304

A promise of pardon to a party to the treason if he will discover the plot, no impediment to his testimony; but if the *king* promise a pardon on condition that if he will witness against any others, he will pardon him, and that be acknowledged, whether it will make him incapable 304. ii. 280

Hard to take away life on the evidence of a party to the crime singly, unless there be strong circumstances 305

A remainder man expectant on an estate-tail, not a good witness; but a disseisor may be a witness to a deed made to the tenant 306

One convict of conspiracy, perjury, or forgery, not a lawful witness; *contra*, if he be pardoned ib

Trespass

Trespass against *A. B.* and *C.* if no evidence be given against one to prove him guilty, he may be examined on the part of the other defendants; and if two be indicted, and there be no evidence against one, whether he may not be a witness for the other; but otherwise it is, if there be a colourable evidence against him Page 306, 307

Wife may be an evidence against her husband indicted for aiding another to commit a rape on her 629

Where an infant under twelve in capital cases may be heard without oath 634, 635. ii. 284

Difference between admitting a witness to be heard, and believing him when heard 635

Second wife married, leaving the former, may be a witness against the husband, but not the first wife 693

Jurors triers of credibility of witnesses, as well as truth of the fact 635. ii. 235, 276, 277

Many things disable a juror, which disable not witnesses ii. 276

Distinction between exception to the credit, and to the competency ii. 276, 277

One outlawed a competent witness ii. 277

Who witnesses or not, and how incompetent witnesses restored ii. 277 to 285

He that alledgeth an exception of record, ought to shew forth a copy of the record attested, or vouch the roll in court ii. 278

If *king* pardon incompetent witnesses, they are rendered competent, tho their credit shall be left to the jury ib

Whether an infidel be a competent witness; a *Jew* may be such ii. 279

A reward given to one for giving his testimony, disables him ii. 280

Consequential benefit to the witness disables not his testimony, Vol. II.

tho it may abate his credit ii. Page 280, 281

Three actions severally brought against three persons for perjury, on the same point, on trial of the first action, the other two are competent witnesses being not immediately concerned, tho consequently the point being the same ii. 280

So where indicted of perjury on three several indictments touching same matter, while the other two stand unconvicted, they may be examined 303

Where one not a witness, because his own suit ii. 281, 285

Appellant nonsuit on appeal may be a witness for the *king* ii. 282

Where *king's* testimony allowed or not ib

Witnesses are brought in by *sub-pœna* issued by justices of peace, *oyer* and *terminer*, *gaol-delivery*, or *B. R.* where the plea triable ib

Or the justices that take examination of the accused, and information of witnesses, or the coroner that doth the same, may at that time, or any other time after, and before trial, bind over the witnesses to appear at the sessions, and in case of refusal either to come, or be bound over, may commit them for contempt ii. 52, 282

Justices, &c have no power to allow witnesses their charges ii. 282

Formerly evidence given for prisoner in cases capital examined without oath; but *contra* in cases not capital ii. 283

If a witness be sworn for the *king*, yet if that witness alledge any matter in his evidence that is for the prisoner's advantage, that stands for a testimony for the prisoner as well as the *king* ib

One of nine years hath been sworn on evidence, in capital causes ii. 283, 284

A TABLE OF THE PRINCIPAL MATTERS, &c.

Where they that live, and have land in the hundred, are competent witnesses, or not, in an action against the hundred on the statute of *Winton* ii. Page 280, 281

Vide Evidence.

Wool. Vide Felony by Statute.

Words.

Words are easily subject to be mistaken or misapplied, or misrepeated, or misunderstood, by the hearer 111, 112

1 E. 6. puts the very same offenses in words spoken in a lower

rank of punishment than the same things written or printed
Page 291, 296, 315

Writing scandalous words mentioned in 5 & 6 E. 6. and thereby made treason, not treason within 25 E. 3 296

Whether the two penalties previous to treason in case of words, viz. for the first and second offense in 5 & 6 E. 6. be repealed by any act ib

Words no provocations to kill a man, nor will they lessen a crime from murder to manslaughter, except words of menace of bodily harm 456, 457

Vide Murder, Treason.

Year and Day. Vide Computation.

F I N I S.

CORRIGENDA in the TABLE.

In titulo Allegiance for fidelitas regia, read fidelitas legea. From Ambassador refer to Treason. From Amendment to Record. In the references under Appeal, instead of Vide Process, make it Vide Outlawry. In titulo Arrest, after these words, For what end constable or any other during affray may break open doors, insert but not after— unless, &c. Under Burglary dele clergy allowed to one attaint, which is inserted under its proper head Clergy. For the form and analysis of caption of indictment on return of certiorari, refer from Certiorari to Indictment. From Certiorari refer to Plea. Refer from Cover- ture to Principal and Accessary. Under Jesuit dele reference to Treason.

Printed by E. Rider, Little-Britain



xx 5/96

Buchbinderei
CHR. SCHWAB
München

Hale, Matthew, 1609-1676 / Emlyn, Sollom / Wilson, George

The History of the Pleas of the Crown in two volumes

Bd.: 2

London (1800)

J.rel. 200-2

urn:nbn:de:bvb:12-bsb10563567-2